IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO: 75-6909

GARY MANESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender Rehabilitation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, GARY MANESS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on the 18th day of March, 1976.

OPINION BELOW

The full opinion of the United States Court of Appeals for the Fifth Circuit appears in the Appendix hereto. The reported opinion appears at 512 F.2d 88.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on April 25, 1975. A suggestion for rehearing en banc was timely filed, (App.) and was granted on September 2, 1975. (App.). On March 18, 1976, the court of appeals, sitting en banc, voted 10:5 to vacate its order granting rehearing en banc. § 12 F.2d 1381 (App.).

This petition for a writ of certiorari is timely filed within ninety days of the disposition of the suggestion for rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE INSTANT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WHICH AFFIRMS A DENIAL OF FEDERAL HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW, IS ERRONEOUS AND IS IN REAL CONFLICT WITH THE DECISION BY THIS COURT IN CHAMBERS v. MISSISSIPPI, 410 U.S. 284 (1973) AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN UNITED STATES v. TORRES, 477 F.2d 924 (1973).

STATEMENT OF THE CASE

This case arises from the petitioner's trial on charges that he was criminally responsible for the death of his and his wife, Linda's, infant daughter. The infant, Misty Maness, died in April of 1971, the victim of the "battered child syndrome." The police conducted an investigation of both petitioner and his wife, regarding the death of the child.

On June 8, 1971, an information was filed in the Criminal Court of Record, Dade County, Florida, charging the petitioner with manslaughter. (Tr. 406). Petitioner interposed a plea of not guilty, and a jury trial was had on October 4th and 5th, 1971.

At his trial, the petitioner sought to establish that he was innocent of the charges and that there was reason to believe that his wife, Linda Maness, the only other suspect to the crime, had committed the offense.

The petitioner testified at his trial that he had made an inculpatory extra-judicial statement to the police to protect his wife, because, at the time, he thought she was pregnant. Petitioner further testified that the statement he had previously given was one which he had agreed upon with his wife prior to their interrogation by the police in order to protect her from arrest and was not, in fact, the true version of what had happened. (Tr. 291-297,250,310-311).

The state did not charge Linda and at the petitioner's trial, failed to call her as a witness in the state's case in chief. Petitioner's trial counsel was thus forced to call Linda as a witness, and immediately asked the court to declare the witness an adverse and hostile witness so that she could be cross-examined. The court refused to permit the defense to treat Linda as an adverse and hostile witness. Linda testified consistently with the state's position, and defense counsel's attempts to impeach her testimony, in

which she, inter alia, denied striking the baby, were prohibited by the state trial court on the grounds that the defense would not be permitted to impeach its own witness (The Voucher Rule).[1] (Tr. 245-270) Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by Linda Maness to Gary while he was in jail awaiting trial. (Tr. 252-260). These letters in effect tended to exculpate Gary Maness in that they stated, inter alia, that Gary had not done the act with which he was charged. (App.)[2].

Later in the petitioner's state court trial, the defense counsel called Dana Maness, petitioner's sister-in-law, as a witness. (Tr. 322) The state objected to her testifying on the grounds that her testimony would tend to impeach Linda, whom the state argued was a defense witness and therefore could not be impeached by the defense pursuant to the voucher rule. This objection was sustained by the trial court. (Tr. 323) Defense counsel then proffered to the court that Dana Maness would testify that while in Tennessee, Linda had had a conversation with her in which she told Dana that Gary Maness did not touch the baby and that she did not know what happened, but that Gary Maness did not do what he had been charged with. (Tr. 324) The proffer of Dana's testimony also included an admission by Linda that she had never left her home on the afternoon the baby was fatally injured. This would have contradicted Linda's in court testimony (Tr 250) and statements to the police, and supported petitioner's version of the case. The state trial court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from

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[1]The voucher rule applied by the Florida court is identical to the rule condemned in Chambers v. Mississippi, see , infra.

[2]These letters were attached to a motion for leave to supplement the record pursuant to Federal Rule of Appellate Procedure 10(c) filed in the Fifth Circuit simultaneously with the submission of the petition for rehearing and suggestion for rehearing en banc. See page , infra and Appendix .

impeaching his own witness. (Tr. 323-324)

Defense counsel also attempted to call Ruth Maness, mother of the defendant, but the state objected to her testimony (as proffered) on the grounds that it tended to impeach Linda, a defense witness and therefore was improper under the state voucher rule. The trial court sustained the prosecution's objection. (Tr. 325) The proffer concerned certain bloody baby blankets which were found at the Maness residence while Misty was in the hospital. Linda had testified before the jury that the source of this blood was the baby's cracked gum. (Tr. 266-267) The proffer of Ruth's testimony indicated that Linda had told Ruth that the bloody baby blanket was a result of Linda's menstrual period. (Tr. 325) This testimony was excluded by application of the voucher rule. (Tr. 325)

The petitioner took the stand to testify in his own defense. His testimony directly contradicted Linda's on a number of crucial points.

The petitioner testified that Linda was lying when she stated that she had left the house on the afternoon the injuries were inflicted. (Tr. 310-312) The petitioner admitted that he had lied when he had stated to the police that this was the case, but that he had done so for the purpose of protecting his wife. (Tr. 294,295,305,311,312,317) He was protecting his wife because she had told him that she was pregnant, and the police had told him that if he did not confess there was a good chance of his wife going to jail. (Tr. 292,305, 317,320)

On cross-examination by the state, Linda had testified that she had seen the petitioner slap the baby in the face on the day in question. (Tr. 270) The petitioner testified that his wife was lying and that he did not at any time strike the baby in the face. (Tr. 277,303,304,307)

Linda described an incident in which the petitioner had slapped the baby on the leg, and when Linda tried to

pick up the baby, the petitioner had slapped Linda. (Tr. 271-272,274) The petitioner testified that his wife was lying and that it was his wife who had slapped the baby on that occasion. He told her to stop;, she said she did not have to, that it was her baby, and the petitioner then slapped his wife. (Tr. 286)

Linda testified that the petitioner had told her that he was not ready to be married and that she should take the baby and go back to her parents. (Tr. 265, 272-273) The petitioner testified that he did not feel unduly burdened by the marriage, and that he had not told his wife to leave. (Tr. 297-299) The petitioner testified that it was his wife who had been unhappy and wanted a divorce. (Tr. 297,309)

Defense counsel attempted to inquire whether Linda had filed for a divorce against the petitioner. The trial judge sustained the State's objection on relevancy grounds. (Tr. 262)

With regard to how the baby had sustained its injuries, the petitioner testified that he knew only what his wife had told him in this regard, and that he had always been truthful with the attending physicians to the best of his knowledge and, according to what Linda had told him, the baby had fallen down, or gotten caught in its crib, or hit itself in the head with its bottle. (Tr. 313-315, 318-319)

The defense theory of the case, as limited by the trial court's repeated exclusions of evidence based on the state voucher rule went to the jury, and on October 5th, 1971, the jury returned a verdict of guilty. The court adjudged the petitioner guilty and sentenced him to be confined in the state penitentiary for a period of twenty years. (Tr. 440) (which sentence is currently being served).

Petitioner timely appealed from the judgment of conviction and sentence to the District Court of Appeal of Florida, Third District. (Tr. 441) The judgment of the trial court was affirmed. Maness v. State, 262 So.2d 716 (Fla. 3d Dist. 1972). (App.).

In that appeal, the petitioner claimed that the

trial court had deprived him of the right to offer testimony and present a defense as guaranteed by the due process clause of the Fourteenth Amendment. The District Court of Appeal rejected this argument and reaffirmed the voucher rule by holding: "An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the State." Id. at 717.

On October 23, 1973, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. (App.) The petitioner claimed that the exclusion of defense evidence by the state trial judge denied the petitioner due process of law and contravened principles enunciated by the Supreme Court of the United States in Chambers v. Mississippi, 410 U.S. 284 (1973).

More specifically, the petition for habeas corpus relief alleged a deprivation of the petitioner's fundamental constitutional rights to due process of law as a result of:

> 1. The petitioner was precluded from cross-examination of Linda Maness, the only other suspect to the crime, regarding her knowledge that Gary Maness was innocent, and prevented the Defendant from showing that Linda Maness' in-court testimony differed greatly from her extra-judicial statements regarding the death of the baby. (Tr. 245-270)
>
> 2. The petitioner was precluded from impeaching Linda Maness by showing that she had written letters to Gary which contained, inter alia, statements to the effect that Gary was innocent and that she was sorry for what she had done to him. (Tr. 252-260)
>
> 3. The petitioner was precluded from calling Dana Maness who would have testified that Linda Maness had made extra-judicial statements to her to the effect that the Defendant was innocent of the charges against him. (Tr. 322-325)
>
> 4. The petitioner was precluded from calling Ruth Maness who would have testified that Linda Maness' in-court statement significantly differed from her extra-judicial statements. (Tr. 336-337)

The habeas corpus petition averred that

> Defense counsel had asked the Court for permission to treat Linda Maness as an

> adverse witness so that it would impeach her statement regarding the commission of the offense with which the defendant was charged. Defense counsel was trying to show that Linda Maness and not the petitioner had battered the child and caused the child's death. He was precluded from doing so by the trial Court's ruling regarding the impeachment of one's own witness. (R. 6)

The district judge made no finding of fact regarding the role of the petitioner's wife in the trial or the nature of her testimony, except that the defense moved to call her as an adverse or hostile witness and that this motion was denied. (R. 36) The petition alleged that upon taking the stand, "Linda Maness testified consistently with the State's position". (R. 2) The respondent confirmed this allegation:

> It was Linda Maness's testimony that on the day in question the victim was in good health throughout the day until Mrs. Maness left about 4:00 or 4:15 p.m. When she returned she found the child in the battered condition in which she died. (R. 250) She further stated she did not know how the child was injured. (R. 252) (R. 24)

The district court found that the petitioner had adequately exhausted his state remedies, and so decided the case on the merits. (R. 38) It also determined that Chambers v. Mississippi, supra, had announced no new principles of constitutional law and that Florida's assertion that petitioner's claim presented a question regarding the retroactive application of Chambers was incorrect. (R. 37-38)

On December 18, 1973, the district court entered its order of dismissal of the habeas corpus petition. (R. 34-42) The habeas judge held that the evidentiary rulings of the state court "did not have the effect of thwarting any defense theory the petitioner sought to assert." (R. 41) This conclusion was reached notwithstanding the district court's findings of fact:

> Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store

during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness.

Finally petitioner attempted to present the testimony of his sister-in-law, Dana Maness, regarding admissions made to her by petitioner's wife that petitioner had not touched the baby; and that she did not know what had really happened; and that she had never left her home during the afternoon hours of April 14, 1971. (R. 63) (Emphasis added)

On January 9, 1974, petitioner filed a motion for reconsideration or alternatively for a certificate of probable cause and memorandum in support thereof. (R. 43-75) On January 14, 1974, the United States District Judge entered his order denying the motion for reconsideration and granting a certificate of probable cause to appeal and leave to proceed in forma pauperis.

On January 18, 1974, the petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit.

On appeal to the Fifth Circuit the petitioner argued:

> THE DISTRICT COURT ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW.

The factual parallels between the instant case and this Court's ruling in Chambers v. Mississippi, 410 U.S. 284 (1973), were extensively argued both in petitioner's brief and on oral argument. Petitioner also relied on the ruling of the Ninth Circuit in United States v. Torres, 477 F.2d 924 (9th Cir. 1973). Torres, relying upon the rule announced by this Court in Chambers, reversed a conviction and held, upon facts much less devastating to the defense theory than those which exist in the present case or in Chambers, that:

> The rule against impeaching a party's own witness (is) a pointless limitation on the search for truth. United States v. Torres, supra at 925.

The Fifth Circuit, in a split decision, rejected petitioner's arguments, notwithstanding the majority's unequivocal findings that

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. Maness v. Wainwright, 512 F.2d at 92.
>
> It would certainly have furthered the 'integrity of the fact-finding process.' Chambers, supra at 925, 93 S.Ct. at 1046, if Maness had been allowed to cross-examine her [Linda]. 512 F.2d at 91.

The majority, in essense, based its affirmance on the following:

> a. Chambers is applicable, but "we cannot read Chambers as broadly as Maness would have us. . . ." 512 F.2d at 91.
>
> b. Although Maness' defense theory was restricted by operation of the state voucher rule, the applications of the rule did not amount to the degree of interference which would constitute a denial of Maness' right to a fundamentally fair trial. 512 F.2d at 89, 92.
>
> c. Maness' explanation as to how the baby was injured was unrealistic. The opinion finds:
>
> > "Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in the head with her bottle." 512 F.2d at 92.
>
> d. With regard to the profferred but excluded testimony of Dana and Ruth Maness (which contradicted Linda's in court testimony and statements to the police), the court did "not find in a close relative's testimony the 'persuasive assurances of trustworthiness' cited by the court in Chambers. . . ." 512 F.2d at 92.
>
> e. Linda's letters, which were excluded by the state trial judge, were not made part of the record and "[i]t is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense." 512 F.2d at 91.

In dramatic contrast to the findings in the majority opinion, Judge Clark, dissenting, could perceive no distinction between the proof wrongfully excluded in Chambers and that refused in the case at bar. 512 F.2d at 93.

Judge Clark found that the excluded evidence corroborated Maness' recantation of his confession, that the evidence was excluded as a direct result of the application of Florida's voucher

rule, that the exclusion of this evidence violated due process of law, and that, at a minimum, the case should have been remanded for a determination of the authenticity and content of Linda's letters.

On or about May 21, 1975, petitioner filed his Petition for Rehearing and Suggestion for Rehearing en Banc. (App.)

The bases for the petition were arguments that:

1) The majority's narrow interpretation of the holding of Chambers was erroneous; especially in light of its finding that Chambers was applicable to the case.

2) Even accepting a narrow interpretation of the Chambers holding, the state trial judge's repeated exclusions of evidence based on the Florida Voucher Rule interfered with Maness' ability to present his defense to such a degree that his constitutional guarantee of due process of law was denied him.

3) The majority's finding that Maness' in-court explanation of how the baby sustained injuries was improbable, overlooked Maness' testimony that he based this explanation on what "Linda told me. . . [w]hen I asked her how she [the baby] got the bruises." (TR 317-318). As explained, this version of the baby's injury is entirely consistent with Maness' version of the events of the day in question and with the thrust of Maness' defense.

4) The majority's repeated references to the fact that Linda's letters were not part of the record on appeal, and, that they therefore could not be evaluated by the court to determine what effect their exclusion would have had on the defense, were irrelevant and improper. The habeas petition contained sworn allegations as to the letters' contents. The State of Florida did not controvert the statements. The habeas judge, in its order of dismissal of December 18, 1973 (App.), made findings as to the nature and contents of Linda's letters, which findings were not attacked by the respondent at any time. Moreover, as will be established hereinafter, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Rule 10(c), which contained synopses

of the contents of the letters, and had attached thereto copies of Linda's most damning letters.

5) The majority's finding that the excluded testimony of Dana and Ruth Maness lacked the "reliability and trustworthiness" which characterized the "hearsay" improperly excluded in Chambers was erroneous and irrelevant. The profferred testimony was impeachment evidence (of Linda's in-court testimony) and therefore was not "hearsay" as the majority erroneously concluded. Rather, the impeachment evidence was a category of non-hearsay, in that it was not coming in for its truth. Also, and alternatively, the fact that such evidence cross-corroborates the other excluded evidence and Maness' testimony, rendered its exclusion even more prejudicial.

Petitioner argued that the case involved a matter of exceptional importance, warranting a rehearing en banc. (App.) In that regard, the petitioner argued that the Maness case was the first enunciation of the Fifth Circuit directly interpreting Chambers and that the majority had erred in reaching a result opposite that reached by this Court in Chambers. Also, petitioner argued that the Maness decision was irreconcilable not only with Chambers, but also with the Ninth Circuit's recent case applying Chambers, United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

As previously mentioned, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Rule 10(c). (App.). Attached to the motion were copies of many of Linda's letters which had been excluded by the state trial judge. The motion pointed out that the majority's numerous references to the unavailablilty of the letters were the first time the apparent lack of the letters was relied upon to deny Maness habeas corpus relief. Moreover, the motion set forth the repeated efforts of petitioner to admit the letters in his state court trial (see Tr. 252-260). This motion was denied by the Fifth Circuit on June 11, 1975, without opinion.

In response to the petition for rehearing and suggestion of the appropriateness of a rehearing en banc, a majority of the

judges of the Fifth Circuit voted in favor of granting a rehearing of the cause en banc on briefs without oral argument. 519 F.2d 1085. (App.). In accordance with that order, the parties filed supplemental briefs. (App.).

On March 18, 1976, the court entered two orders. The first denied the petition for rehearing. (App. .) The second vacated the September 2, 1975, order granting rehearing en banc. (App. .) From the order denying rehearing, Judge Clark dissented: [T]he majority has misapplied the principles of Chambers v. Mississippi to the facts of this bizarre and tragic case." (App.) 528 F.2d 1383.

The order denying rehearing en banc was signed by nine circuit judges; five dissented, and one concurred in part.

The five dissenters and Chief Judge Brown, concurring with the dissent, opined that the en banc majority had decided the Maness case on the basis of Chambers, but had reached the wrong result. The en banc dissenters observed that the majority failed to present a version of the facts which contradicted the account set forth in Judge Clark's dissent, which dissent was characterized as "unanswerable." 512 F.2d at 1382 (5th Cir. 1976). The en banc dissenters acknowledged that Maness' defense theory was that there was reason to believe that Linda, and not he, was the perpetrator of the crime, and that all evidence excluded tended to cross-corroborate this defense. The dissenters concluded that Chambers requires that a defendant be afforded a fair opportunity to defend, that the majority opinion is clearly inconsistent with Chambers, and that Chambers can only be distinguished "in immaterial factual details." 512 F.2d at 1382 (5th Cir. 1976).

The instant petition for a writ of certiorari timely followed the March 18, 1976 orders.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Real Conflict With Decisions Of This Court And The Ninth Circuit Which Hold That The Voucher Rule Can Not, Consistent With Due Process, Be Applied So As To Interfere With A Criminal Defendant's Fair Opportunity To Present A Defense.

As will be developed with specificity hereinafter, certiorari review is necessary because the opinion as to which review is sought directly conflicts with the holding of this Court in Chambers v. Mississippi, and is inconsistent with the opinion of the Ninth Circuit in United States v. Torres, both of which cases involve the same points of law and fact as are involved in the instant case. In order to reconcile this conflict, and to insure uniformity and eliminate confusion among the circuits, it is essential that this Court issue its writ of certiorari.

The majority opinion as to which review is sought states:

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The majority opinion thus concedes that Gary Maness' defense was adversely affected by the state trial court's exclusion of evidence based on the Florida Voucher Rule. The opinion goes on, however, to affirm the denial of habeas corpus relief because, in the opinion of the majority, the degree of the state trial court's interference with the petitioner's efforts to establish a defense did not violate Maness' right to a fair trial. 512 F.2d at 92. In reaching this decision, it is respectfully submitted that the opinion misinterprets and misapplies the controlling facts and law of Chambers v. Mississippi. In Chambers, this Court reversed a state murder conviction. The reversal was based in part on the principle that a state's voucher rule, could not, consistent with due process, be applied so as to interfere with a criminal defendant's fair opportunity to present a defense. In Chambers, this Court said in no uncertain terms:

> Whatever validity the "voucher" rule may once have enjoyed, and apart from whatever usefulness

> it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. Chambers v. Mississippi, 410 U.S. 296 (1973).

Here as in Chambers, the thrust of the defense is that some one other than the petitioner is guilty of the offense. In Chambers, the defendant was permitted to call one Gable McDonald when the state failed to do so in the state's case in chief. When McDonald was on the stand his written confession was admitted into evidence. On cross-examination by the state, McDonald repudiated the confession on the grounds that it was part of a scheme to free Chambers so that a false arrest suit could be brought in which McDonald would participate in the proceeds. After McDonald's repudiation the defense then attempted to cross-examine McDonald as to his repudiation. Thus, in Chambers, the defense was permitted to introduce into evidence the written extra-judicial statement by the witness (something not permitted in the case at bar), but was thwarted only in the cross-examination of the witness as to his repudiation of that extra-judicial statement.

In contrast, in Maness, Linda's letters were not permitted into evidence, notwithstanding the defense's repeated efforts to have the letters admitted. (Tr. 253-260) Thus, the instant opinion's judgment that "Chambers' trial was a palpable miscarriage of justice" (512 F.2d at 91) but that here "the Voucher Rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause" (512 F.2d at 92) is patently erroneous.

The defense was permitted to go much further in Chambers than the defense in Maness was permitted to go, and the Supreme Court reversed Chambers' conviction because of the application of the Voucher Rule in precluding the cross-examination of McDonald as to his repudiation of the confession. Maness was not even permitted to introduce into evidence Linda's extra-judicial letters, nor was he permitted to cross-examine her as to the contents of those letters. The

written confession of McDonald in Chambers is parallel to Linda's letters in Maness. The confession in Chambers was introduced into evidence, the letters in Maness were not. That and that alone is sufficent to establish that the instant case manifests a greater deprivation of constitutional rights than that which was present in Chambers. The opinion sub judice suggests that the deprivation in the Maness case was of a lesser degree than that in Chambers. This conclusion can only result from a misapplication of the controlling facts of the Chambers decision.

The Maness opinion is a case of first impression in the United States Court of Appeals for the Fifth Circuit interpreting Chambers v. Mississippi. Although the facts and points of law in the two cases are similar, the Fifth Circuit reached a result diametrically opposed to that reached by this Court in Chambers. Moreover, at least one other Circuit, in interpreting Chambers, has reached a result contrary to that reached by the Fifth Circuit in the instant case. See United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

In United States v. Torres, supra, the Ninth Circuit applied the Chambers rationale and reversed a conviction where the trial judge had precluded the defense from impeaching its own witness. Torres, who had been charged with importing and possessing cocaine and heroin, called as a defense witness one Anselmo Lebron, the man who had been in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket, in which the drugs were found, had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's testimony by introducing Lebron's prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent suprise,

one may not impeach his own witness. The Ninth Circuit, citing Chambers, reversed the conviction and held

> It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres. The rule against impeaching a parties' own witness [is] a pointless limitation on the search for truth. United States v. Torres, 477 F.2d at 925.

Thus, because the Maness opinion reaches a result diametrically opposed to that reached by this Court in Chambers' and inconsistent with the opinion in Torres involving the same question of law and fact, this case, especially in light of the well-reasoned dissent of Judge Clark, is one of exceptional importance warranting certiorari review by this Court.

Moreover, the entire thrust of the defense in Maness' case was predicated upon the establishment of a reasonable doubt as to Gary's guilt in light of Linda's letters. The opinion states:

> Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. 512 F.2d at 91.

In three or four other parts of the decision as to which review is sought, the majority points out that Linda's letters are not before them and therefore cannot be examined as part of an analysis of whether their preclusion significantly affected Maness' defense. However, sworn allegations as to the contents of the letters were made in the habeas corpus petition. These statements were not controverted by the response of the Attorney General of the State of Florida in the District Court. Moreover, the District Court made specific findings as to the contents of the letters. Because the habeas judge made findings as to the nature and content of Linda's letters, which findings were supported by the record, it was highly improper for the Fifth Circuit to deny Gary Maness relief predicated upon the perceived unavailability of the letters. As is pointed out in Judge Clark's dissenting opinion, "at a

minimum, it seems to me that this case must be remanded for a determination of the authenticity and content of Linda's letters". 512 F.2d at 93. The Fifth Circuit's affirmance of the order dismissing the petition for habeas corpus relief based upon the purported unavailability of these letters is indicative of how far the majority had to go to circumvent the clear import of the Chambers holding.

The opinion further misinterprets controlling facts in the Maness case crucial to a just determination of petitioner's claim. The opinion states:

> Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in her head with her bottle. 512 F.2d at 92.

While Gary Maness did testify to that effect, the majority ignores the fact that Gary also testified that this was his belief only because this is what his wife had told him as to how the baby had sustained the injuries:

> Q. Now, when you say that you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said, "that's as far as I know," how do you know that's how it happened?
>
> A. Because Linda told me.
>
> Q. When did she tell you that?
>
> A. When I asked her how she [the baby] got the bruises. (Tr. 317-318).

Thus, Gary's explanation of how the baby sustained these injuries is entirely consistent with the thrust of his defense that he was innocent, and there was reason to believe that his wife's in court testimony was false and impeachable, and that she had, in fact, committed the crime. The letters corroborate this view. The proffered testimony of Dana Maness corroborates this view. Maness' version of the events of the day in question corroborates this view.

Moreover, it is respectfully submitted that the opinion overlooks and misconstrues a controlling point of law in the Maness case in reaching its decision that:

> This trial record, our inability to find any positive indicia of the reliability of the hearsay testimony of Ruth and Dana Maness, and the unavailability of the letters for our inspection, leads us to conclude that the voucher rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause. 512 F.2d at 92.

Throughout the opinion, the court characterizes the proffered testimony of Dana and Ruth Maness as hearsay testimony which lacks the reliability and trustworthiness of hearsay testimony in Chambers. This perceived distinction from Chambers is not at all relevant to the instant case, and even if it were relevant, it is based on a fallacious legal premise. This testimony (Dana and Ruth) was sought to be introduced to impeach Linda's in-court testimony. Thus, it is not hearsay at all, as the Fifth Circuit suggests, but rather a category of non-hearsay (not coming in for its truth) and would be acceptable as evidence had it not been excluded based on the Florida Voucher Rule. (See Rule 801.2 of the Federal Rules of Evidence). Thus, the opinion's characterization of Dana and Ruth's testimony as "hearsay testimony" lacking the reliability and trustworthiness of the hearsay testimony wrongfully excluded in Chambers is a fallacious basis upon which to deny this petitioner habeas corpus relief. Moreover, each item of evidence excluded in the Maness case cross-corroborates the others, thereby supplying any requisite "reliability and trustworthiness" that the opinion finds lacking.

It is submitted that the dissenting opinion of Judge Clark in the instant case suggests the constitutionally correct disposition of the petitioner's claim:

> The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements, but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumes sole responsibility, subject to the implausible possibility of self injury. Linda's letters and Dana's statements intended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida Voucher Rule which sanctified Linda's testimony from attack by Gary.

> As I perceive the due process principle announced in Chambers, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. At a minimum, it seems to me that this case must be remanded for determination of the authenticity and content of Linda's letters. If these were her letters and read as described, it further is my view that habeas corpus relief should be granted and Florida should be required to retry Gary in a fair proceeding which admits all of the facts in testing for the truth. 512 F.2d at 93.

CONCLUSION

The tragic death of this infant child should not cloud or diminish the petitioner's rights to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution as interpreted by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). The parallels between the Maness case and the Chambers case are striking. The prejudice suffered by Maness and Chambers should not be subject to artificial distinctions and calculations regarding the degree to which the defendant is thwarted in his effort to effectively present his defense. The opinion concedes prejudice to the petitioner by virtue of the application of the Florida Voucher Rule. The petitioner's efforts to establish a reasonable doubt in the minds of the jury as to his guilt were obviously thwarted. To grant the petitioner a new trial in which the letters of Linda Maness and the testimony of Dana and Ruth accompanied by the cross-examination by the defense of Linda would further the cause of justice and the preservation of basic constitutional liberties. To deny this new trial on fancied distinctions between this cause and the rule of law of this Court as enunciated in Chambers would be to derogate from the standards established by this Court in Chambers and to permit confusion and disharmony to exist among the circuits concerning a fundamental point of constitutional law. Perhaps even more importantly, and on another level, this Court should not allow the door to be closed on an innocent man while his wife escapes the damning implications of her letters and extra-judicial statements.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-6909

GARY MANESS, PETITIONER,

vs.

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 12, 1976
CERTIORARI GRANTED OCTOBER 18, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6909

GARY MANESS, PETITIONER,

vs.

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1971	
June 8	Information filed against petitioner in the Criminal Court of Record, Dade County, Florida, Case No. 71-4452
Oct. 4-5	Jury Trial
Oct. 5	Verdict, judgment and sentence
Nov. 3	Notice of Appeal
1972	
May 30	Judgment and opinion of the District Court of Appeal of Florida, Third District, Case #71-1206
1973	
Oct. 23	Petition for Writ of Habeas Corpus filed in the United States District Court for the Southern District of Florida, Case #73-1664-Civ-PF
Dec. 18	Order of dismissal
1974	
Jan. 18	Notice of Appeal
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Apr. 25	Judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Case #74-1538
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1976	
Mar. 18	Order vacating order granting rehearing en banc and order denying petition for rehearing
June 12	Petition for a writ of certiorari docketed in the Supreme Court of the United States
Oct. 18	Petition for a writ of certiorari granted, Case #75-6909

EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
-vs-
GARY MANESS,
Defendant.
} No. 71-4452

The above-entitled case came on for trial before the Hon. Ellen J. Morphonios, Judge of the above-styled court, and a jury, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Monday, October 4, 1971, at 2:00 o'clock p.m., pursuant to notice.

APPEARANCES:

TERRENCE J. MCWILLIAMS,
HARVEY SHENBERG and WILLIAM R. TUNKEY,
Assistant State Attorneys, on behalf of the State of Florida.

CARL MINKUS, Esq., on behalf of the Defendant.

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STATE EXHIBITS

THE COURT: Gary Maness.

MR. MCWILLIAMS: State's ready, your Honor.

MR. MINKUS: Defense is ready.

MR. MCWILLIAMS: We have an out-of-state witness and three doctors on standby, one of whom is leaving.

Also, the defense refuses to let me speak to the witnesses. Since they have invoked Rule 4, we would ask your Honor to exclude all of their testimony.

MR. MINKUS: If your Honor please, I didn't invoke any rule; the only motion I filed is a motion to suppress.

THE CLERK: We don't indicate any Rule 4, no.

THE COURT: All right. Marking Gary Maness ready.

(Thereupon, a recess was taken, during which time other court proceedings were had, following which this trial resumed.)

THE COURT: Gary Maness must be tried.

Now, Maness must be tried by 10/26.

MR. SHENBERG: Okay. So, I think that's the earliest of all the dates.

(Thereupon, a recess was taken, during which time other court proceedings were had, following which this trial resumed.)

MR. MINKUS: Your Honor, I am here on Maness. We were just talking——

THE COURT: It will be going to trial very shortly.

MR. MINKUS: Okay.

Well, your Honor, may I ask you something? My witnesses were served with subpoenas for depositions at 12:30 today, by Mr. McWilliams, and we appeared up there. I won't be able to be in the courtroom.

MR. SHENBERG: If your Honor please, those aren't depositions; they are State Attorney statements and counsel doesn't have to be there.

MR. MINKUS: Well, I want to be there when the——

MR. MCWILLIAMS: He doesn't have any right, under the existing case law, and I am not going to let him in the office, anyway.

THE COURT: That's right.

(Thereupon, a recess was taken, during which time other

court proceedings were had, following which this trial resumed.)

THE COURT: Gentlemen, are we ready for the jury venire on Maness?

MR. MCWILLIAMS: Yes, your Honor.

THE COURT: Bring them in.

MR. MINKUS: Your Honor, if I may, I have a motion pending to suppress the statements made by Gary Maness.

However, I would like it if your Honor would defer ruling on the motion until the end of the case, because I think there is legal precedent to that. I think it's time saving, and that's what I would like to do.

MR. MCWILLIAMS: We would just as soon hear it now, so we can present our point.

THE COURT: The whole problem is there is a jury on its way in. Nobody informed me of this.

How long will it take?

MR. MINKUS: Let me say this, your Honor——

THE COURT: Well, the State has in the event there be a ruling unfavorable to the State, the State has a right to appeal it, which, of course, they cannot do once jeopardy attaches. That's why they want it heard prior to the time of actual trial.

MR. MINKUS: Well, can you defer ruling on the motion until the conclusion of the case, because it is the basis of my case that the defendant did not make this confession freely and voluntarily, and I must show this by all the witnesses in the case.

MR. MCWILLIAMS: He's going into something completely different. He is going into it on the basis that the confession is not credible, not that it's adduced in violation of the Fourth Amendment.

All he is saying is the defendant lied in his confession, because of a certain reason.

MR. MINKUS: I'm not saying that at all. I am saying my motion is based on two points: one, that it's in violation of Miranda; and, second, that it was coerced.

But to show you that coercion, I have to produce all the witnesses and all of my evidence.

MR. MCWILLIAMS: That's not correct, Judge, but he can present it and you can rule on the admissibility of it.

But I am ready on the motion to suppress. I don't want to lose my right to appeal.

There's a written waiver signed in this particular case. We have the investigator who took the confession before the Court.

THE COURT: You mean Miranda?

MR. MCWILLIAMS: Yes, your Honor, not a waiver, a signing of the written Miranda form.

As to his own motives for giving a confession, that doesn't go to the motion to suppress, only whether or not he was coerced or forced by the police officer to whom he gave it.

THE COURT: Yes.

MR. MINKUS: May I reply, your Honor?

The free and voluntary nature of the confession is an indispensable element to his competency; Thomas V. State.

Florida has adopted a rule whereby a trial judge hears all the evidence surrounding the elicitation of a confession and rules on the confession for purposes of admissibility, and its voluntary nature.

It leaves a jury the question of voluntariness as affecting the weight of credibility.

MR. MCWILLIAMS: Basically, your Honor, he is contending that the defendant gave a confession to protect his wife, which doesn't affect the confession.

THE COURT: He gave the confession what? I didn't hear you.

MR. MCWILLIAMS: He is contending that the defendant gave a stenographically recorded confession to protect his wife. But that goes to the credibility of the truth of what's in it, not to the elicitation of the warnings.

THE COURT: That's right.

MR. MINKUS: Your Honor, I said that is only part of the basis.

The second part of my motion to suppress is based directly upon the Miranda warning, the Miranda rulings.

MR. MCWILLIAMS: We are ready.

THE COURT: Well, I agree with Mr. McWilliams on that second part.

As to the Miranda part, let's proceed with that at this moment.

And the other, that's a question of fact. That's something that would have to come up during the course of the trial.

MR. MINKUS: Okay, your Honor. Thank you.

THE COURT: Let's proceed with the Miranda portion at this point.

MR. MCWILLIAMS: At this point, the State is only intending to introduce in the State's case in chief the confession given to Sgt. Frank on April 17, 1971, so it's his witness.

THE COURT: All right. Go ahead on your motion to suppress as far as the Miranda portion is concerned.

Swear him, or whoever you want. I assume you want this officer.

(Thereupon, the witness was sworn on the motion to suppress.)

Thereupon——

MARSHALL FRANK

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Sgt. Frank, calling your attention to——

May I see that confession, please?

THE COURT: All right. While you are looking at that, put your full name into the record.

THE WITNESS: Sgt. Marshall Frank, Dade County Public Safety Department, Homicide Section.

Q. (By MR. MINKUS) Calling your attention to April 25, 1971, did you have occasion to take a statement from Gary R. Maness?

MR. MCWILLIAMS: 26th.

A. 26th, yes, sir.

Q. (By MR. MINKUS) Also, that one before that.

A. Not a formal statement; I had one conversation with him before that.

Q. Was it ever reduced to writing and did he sign that?

A. Not the conversation before that, no.

Q. Do you know if your partner, Sgt. Norris, took such a statement that was reduced to writing and signing?

A. Sgt. Norris took a statement from him, I believe, on the night of the 18th of April. It was reduced to writing, and not signing.

Q. Did that statement differ drastically——

MR. MCWILLIAMS: Judge, I am going to object. It has nothing to do with the admissibility of the statement, and I am not going to introduce it on our case in chief.

His question is did it differ in content from the one given on the 26th. It doesn't affect the motion to suppress.

MR. MINKUS: If your Honor please, I will connect it up.

THE COURT: You are saying that you don't plan to present it, regardless?

MR. MCWILLIAMS: Only on rebuttal, because in the first statement the defendant didn't admit to causing the fatal blows. He just says he didn't really know how it happened, and I don't intend to use that in our case in chief.

THE COURT: And you only intend to use it in the event he says something entirely different, in accordance with that Supreme Court decision from North Carolina?

MR. MCWILLIAMS: Well, there's nothing wrong with it in the first place, but I am just not going to use it in my case in chief. There's warnings in that one, too.

THE COURT: All right. It would seem futile.

Based upon that, you would be prohibited from introducing it on direct.

MR. MCWILLIAMS: I am also waiving the right to appeal that particular point, because we are putting it over.

THE COURT: All right.

Let's proceed.

Q. (By MR. MINKUS) Calling your attention to April 26th, did you have occasion to take a statement from Gary Maness?

A. Yes, sir.

Q. Would you please relate the first time you saw Gary Maness?

A. I saw him the evening of the 25th, which was a Sunday night.

Q. What did you say to him and what did he say to you?

A. The evening of the 25th?

Q. Right, at this particular time.

A. This was after I had spoken to his wife, in private. I went back to his residence and talked to Gary Maness, in private.

At the Homestead Police Department, I told him his Constitutional rights. He told me that he recalled his rights from the time he was told them before by Sgt. Norris.

And at this particular time, he discussed the case, the death of his child, during which he——

Q. Yes. What did he say to you and what did you say to him?

MR. MCWILLIAMS: Concerning the warnings.

Q. (By MR. MINKUS) Concerning the discussion on the evening prior to taking the statement.

A. I said to him—I asked him many questions concerning the health of his child.

THE COURT: Let's don't go into the content of the confession itself. Let's go into the warning that led up to it.

THE WITNESS: Yes, ma'am.

A. (Continuing) The evening of the 25th was not a confession, it was the following day, on the 26th which was the confession, which was a formal statement. The night of the 25th we just had an interview with him. I did advise him of his rights, and he told me he did not have anything to do with hurting the child.

The following day, after I arrested him, at 2:20 p.m., at his residence, I brought him to my office; and after being there for a short while, he asked me what the consequences would be if he made a confession.

It should be noted, at this time, although he was in my custody for one hour, I did not ask him any questions other than his name, his date of birth, and so forth.

When he asked me what the consequences were, I told him that he is charged with second degree murder, and that he could receive anywhere from 20 years to life imprisonment if he was convicted.

I advised him of his Constitutional rights, in that he had a right to remain silent; he didn't have to tell me anything if he didn't want to; he didn't have to make any statements.

I told him if he did say anything or make any confession that they could and would be held against him at a later time in a court of law.

I told him that he still had a right to an attorney, and that if he couldn't afford an attorney to be present then or any time thereafter, the State would appoint one for him.

Q. Did he ask to see an attorney?

A. No. He asked to call his wife, and I told him he could.

Q. Did he ask to see an attorney?

A. No.

Q. He never made that statement?
A. No.
Q. When did he ask to see his wife?
A. He didn't ask to see her, he asked to call her.
Q. I mean, to call her.
A. After I told him his rights, he said, "Can I call my wife?"
Q. What did he say to his wife at that particular time?
A. I didn't listen in on the conversation. As a matter of fact, I only took his word that he was calling his wife. I didn't hear the conversation.

MR. MINKUS: I have no other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. The first time you advised him, did you use the Miranda card?
A. No, sir. I don't use a Miranda card.
Q. After he told you he wanted to make a statement, then did you readvise him?
A. He was readvised again, after he told me he would make a statement, yes.
Q. How did you advise him? Did you use a piece of paper or a card?
A. I presented him with a Constitutional rights warning form.
Q. Do you have that with you?
A. Yes, sir, I do.
Q. Would you take it out, please?

MR. MCWILLIAMS: I ask the Clerk to mark it.
Mark it as State's Identification 1-A, for the purpose of the motion to suppress.

(Thereupon, the document referred to above was marked State's Exhibit 1-A for Identification, on the motion to suppress.)

Q. (By MR. MCWILLIAMS) Let me show you 1-A for Identification, and ask you if you recognize it.
A. Yes, sir, I do.
Q. Is that your signature at the bottom?
A. That's my signature at the bottom.
Q. Is that the defendant's signature?

A. Yes, sir, it is.
Q. Would you read this to us the way you read it to the defendant, and indicate any responses he made after the questions as asked.
A. It says:
"Before you are asked any questions, you must understand your rights."
Q. Did you read this to him?
A. Yes, sir, I did——
Q. Tell the Court——
A. ——when I took the formal statement.

"(1) You have the right to remain silent. You need not talk to me or answer any questions if you do not wish to do so.
"(2) Should you talk to me, anything which you say can and will be introduced into evidence in court against you."

Q. What was his answer?
A. Just that he understood. I said, "Do you understand?"

"(3) If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel.
(4) If you cannot afford an attorney and so desire, one will be provided without charge."

Q. What was his response?
A. I said, "Do you understand?"

He said, "Yes, sir."
I said, "Are you willing to answer the questions that I ask of you?"
He said, "Yes, sir."
I said, "Are you willing to answer these questions without the presence of an attorney?"
"A. Yes, sir."
I said, "Are you fully aware of these rights that have been read to you?"
His answer was, "Yes."

Q. Did he sign that in your presence?
A. After the statement was transcribed, he did sign it in my presence.
Q. All right.

A. And also in the presence of a Notary Public.

Q. Did he sign this 1-A for Identification, the warning form?

A. Yes, sir.

Q. Was that after he gave the responses that you just indicated?

A. He signed this form just previous to the taking of his statement, and then I reread the statement—the form into the statement.

Q. Now, let me show you this.

MR. MCWILLIAMS: Mark this as 1-B for Identification.

(Thereupon, the document referred to above was marked State's Exhibit 1-B for Identification on the motion to suppress.)

Q. (By MR. MCWILLIAMS) I ask you to look over the first three pages of this stenographically recorded statement, and ask you if you can identify the questions and answers in there, pertaining to the rights warning.

A. Yes, sir, I recognize it.

Q. Do these truly and accurately represent the questions and answers that you asked the defendant concerning his Miranda rights?

A. They are true and correct.

Q. Pertaining to the advising, would you read into the record the questions and the answers, as you advised the defendant?

A. After I asked him his name and address and where his parents lived, I then told him:

"Gary, before we go any further I would like to show you this form and ask you if you recognize it."
I indicated it.
He said, "Yes, sir."
I said, "And is that your signature at the bottom?"
He said, "Yes."

"Q. Did you read this form titled Constitutional Rights Warning Interrogation, and fully understand everything on it?

"A. Yes, sir.

"Q. What grade did you go to in school?

"A. 12th.

"Q. Did you sign this form freely and voluntarily?

"A. Yes.

"Q. I would like to again read you the Constitutional rights from this form to verify that you understand everything. Before you are asked any questions, you must understand your rights. You have the right to remain silent."

THE COURT: Did you then again read him all those rights all over again?

THE WITNESS: Yes, ma'am, I did.

MR. MCWILLIAMS: For the purposes of that, we'll just submit it to the Court and introduce 1-A and 1-B, your Honor. All the responses are there.

THE COURT: Counsel?

MR. MCWILLIAMS: Do you admit——

THE COURT: Counsel, do you have any further questions?

MR. MCWILLIAMS: We move to admit 1-A and 1-B.

THE COURT: For the purpose of the motion, alone?

MR. MCWILLIAMS: Yes, ma'am.

THE COURT: Admitted.

THE CLERK: State's Exhibit 1-A for Identification on the motion to suppress becomes State's Exhibit No. 1 on the motion to suppress.

(Thereupon, State's Exhibit 1-A for Identification was marked as State's Exhibit 1 on the motion to suppress.)

THE CLERK: State's Exhibit 1-B for Identification, becomes State's Exhibit 2 on the motion to suppress.

(Thereupon, State's Exhibit 1-B for Identification was marked as State's Exhibit 2 on the motion to suppress.)

MR. MCWILLIAMS: I have just a few other questions.

Q. (By MR. MCWILLIAMS) Did you in any way force or coerce or threaten the defendant?

A. No, sir.

Q. Did you make any promises other than the statement would be introduced in court against him?

A. No, sir.

MR. MCWILLIAMS: You may inquire.

MR. MINKUS: I have no other questions.

May I call the defendant?

(Thereupon, the defendant was sworn on the motion to suppress.)

Thereupon——

GARY MANESS,

the Defendant herein, was called as a witness on his own behalf and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Mr. Maness——

MR. MCWILLIAMS: Would you have him state his name.

Q. (By MR. MINKUS) Please state your name and address, for the record.

A. Gary R. Maness, "A" Battery, Second 52nd, Homestead, Florida.

Q. On the day of April 27th, when this particular statement was taken——

MR. MCWILLIAMS: 26th.

Q. (By MR. MINKUS) 26th, excuse me. And you were in Sgt. Frank's office, what conversation took place between you and Sgt. Frank, if any?

A. Sgt. Frank told me that if I wanted to keep my wife out of jail that I'd have to make a statement and in the statement say that she had nothing to do with it, the baby's death.

Q. Was there any other conversation at that particular time?

What did you do after he told you that?

A. I told him I wanted—when he gave me my rights, he told me that I had the right to see a lawyer. I asked him if I could see a lawyer. He told me if I saw a lawyer that he wouldn't talk to me any more about it until we come to trial.

Q. What did you do after that?

A. Well, I sat there and thought for a few minutes and I asked if I could have a phone call to call my wife. He said I could and he dialed my wife for me.

Q. What did you do after that?

A. I talked to my wife on the phone and I told her what I was going to do; I was going to say I did it to keep her and the baby out of jail.

And I told her to call my mom and dad and tell them what I was going to do and why.

Q. You mentioned your baby?

A. Yes, sir.

Q. What baby are you speaking of?

A. My wife's, because I thought she was pregnant.

MR. MINKUS: No other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. Did Sgt. Frank tell you he was going to put your wife in jail if you didn't make a statement?

A. He said it was the only way I could keep her out of jail.

Q. What were his exact words?

A. He said, "Do you want to keep your wife out of jail? The only way you can do it is to make a statement and in the statement say she had nothing to do with it."

Q. You do remember the court reporter being present, isn't that correct?

A. That's a stenographer?

Q. Yes.

A. She came in after we got through talking and I made the phone call.

Q. This is your signature and you did sign it?

A. Yes, sir.

Q. Any other promises that you would say that the detective made to you?

A. No, sir.

Q. Force you in any way, physically abuse you?

A. No.

You mean, hit me or anything like that?

Q. Yes.

A. No, sir.

MR. MCWILLIAMS: I have no further questions. I will just call back Sgt. Frank.

MR. MINKUS: Sit down.

Thereupon——

MARSHALL FRANK

was recalled as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified further, as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Did you at any time prior to reducing the statement or taking the warnings that we have introduced here, tell the defendant the only way to keep his wife out of jail was to make a statement?

A. I did not say that.

Q. Did you make any indication as to what would happen to his wife if he did not give the confession?

A. No, sir.

Q. In fact, what were the first words from the defendant referring to any confession at all?

A. He asked me what the consequences would be if he gave a confession.

Q. What did you tell him?

A. I told him the penalty for second degree murder and I advised him of his Constitutional rights.

Q. Did you ask him at all to give a confession, in the first place?

A. Not until he made that comment.

Q. Was that comment initiated by anything that you said to him?

A. No.

MR. MCWILLIAMS: No further questions.

MR. MINKUS: May I inquire?

CROSS EXAMINATION

By MR. MINKUS:

Q. Do you mean to say that you had a conversation with Gary Maness on the night previous in which he denied all of this? You picked him up, you arrested him, you took him to jail, you brought him into your office and without any hesitation he just asked you, "I would like to make a statement. Would you please tell me the consequences of my making a statement?"

Is that what you are asking this Court to believe?

A. I did not take him directly to jail. I talked with him on the night previous. The following day, I obtained a warrant and went to his residence and placed him under arrest.

I took him directly to my office, where I began making out the necessary forms that we do.

And as I was sitting there, I wasn't saying anything to him. He was very quiet and he was like thinking to himself.

And he just picked this up and said, "Sgt. Frank?"

And I said, "Yes?"

And he said, "What would the consequences be if I made a confession?"

Q. You are asking this Court to believe that?

MR. MCWILLIAMS: He is arguing with him. I am objecting.

THE COURT: Sustained.

MR. MINKUS: I am just asking him.

THE WITNESS: I am stating the truth, sir.

MR. MINKUS: Okay. That's all.

MR. MCWILLIAMS: Nothing further, your Honor.

THE COURT: Any argument?

MR. MINKUS: None.

THE COURT: Motion to suppress be and the same is hereby denied.

Can we bring the jury in, now?

MR. MCWILLIAMS: Sure.

MR. MINKUS: Judge?

THE COURT: What?

MR. MINKUS: Before we start, are you going to swear the witnesses? Because I'd like to make a motion to exclude the witnesses.

And I'd also like your Honor to direct Linda Maness, who has been brought here by the State from Texas, who is the State's—the defendant's chief witness, but whom I haven't subpoenaed.

I wish you to admonish her to remain here so that the defendant can put her on the stand in his case.

THE COURT: Well, we'll cross that bridge when we come to it.

MR. MINKUS: Thank you.

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(Tr. 31)

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MR. MINKUS: Ladies and gentlemen of the jury, my name is Carl Minkus. I am the attorney for the defendant, Gary R. Maness.

Now, in our system of law it's the Judge's job to tell you what the rules of law are. It's your job to determine the truth of the facts after she gives you the law.

Now, it's my job to ask you certain questions to find out two things: one, will you follow the rules that the Judge gives you; and, two, will you give my client a fair trial.

In order to elicit that, I must have truthful answers from you. That's all I am looking for. Two things: Will you follow the rules that the Judge gives you; and will you give my client a fair trial?

Are any of you friendly or associated with or related to anyone in the prosecutor's office, police department or any law enforcement agency?

(Jury responded negatively.)

MR. MINKUS: Were any of you ever members of a law enforcement agency, either in civilian life or military life?

(Jury responded negatively.)

MR. MINKUS: Have any of you ever been the victim of a crime?

(Jury responded negatively.)

MR. MINKUS: Have any members of your family ever been the victims of a crime?

(Jury responded negatively.)

MR. MINKUS: Have you or any members of your family ever been complaining witnesses in a crime?

(Jury responded negatively.)

MR. MINKUS: Now, Mrs. Jamal, is that correct?

MRS. JAMAL: Jamal.

MR. MINKUS: You understand that it's your job to find the truth in this case?

MRS. JAMAL: (Juror nods head.)

MR. MINKUS: And the truth in a special circumstance, namely: Is it true that Gary Maness killed his baby daughter on a certain day alleged in the indictment?

MRS. JAMAL: Yes.

MR. MINKUS: You understand that?

Now, the State must prove this, not the defendant. He need not prove his innocence. The State must prove this. Do you understand that he needn't say one word in his defense?

The State always has this burden of proving him guilty, it never shifts. He never has to prove his innocence.

Do you further understand that he must, the State must, prove this case beyond a reasonable doubt?

MRS. JAMAL: Yes.

MR. MINKUS: You understand, he must prove it to a moral certainty?

MRS. JAMAL: Yes.

MR. MINKUS: Now, is there anything in the nature of this particular case that would prevent you from being a juror in this particular case? Namely, that this is a charge whereby the defendant, Gary Maness, is being charged with the death of his own baby daughter?

Is there anything that you can think of that would prevent you from giving this man a fair and impartial trial in applying the rules as we have given them to you?

MRS. JAMAL: No.

MR. MINKUS: Mrs. Haydu?

MRS. HAYDU: Um-hum.

MR. MINKUS: You have heard the questions that I have asked of Mrs. Jamal?

MRS. HAYDU: Yes.

MR. MINKUS: Will your answers be substantially the same?

MRS. HAYDU: Yes.

MR. MINKUS: You know, of course, that the fact that a person committed a crime must be proved by direct or circumstantial evidence.

You understand that?

MRS. HAYDU: Yes.

MR. MINKUS: You understand what the term "direct evidence" means? That means that people saw this person, this defendant, do it.

MRS. HAYDU: That's right.

MR. MINKUS: Circumstantial evidence means other evidence.

Do you understand that?

MRS. HAYDU: Yes.

MR. MINKUS: Now, the only evidence that is adduced in this particular case that is presented to you is circumstantial evidence. In other words, it's not eyewitnesses, and that evidence is subject to any other reasonable explanation that is presented to you which is believable to you, which would mean that the defendant is not guilty, would you find him not guilty?

MRS. HAYDU: Yes.

MR. MINKUS: You realize, of course, that the indictment in this case is not evidence of any kind?

MRS. HAYDU: Yes.

MR. MINKUS: It's merely a piece of paper used to bring

the defendant into court, the same as a complainant in a civil case?

Do you understand that?

MRS. HAYDU: Um-hum.

MR. MINKUS: Do you know that a man is presumed innocent until he's been proven guilty beyond a reasonable doubt?

MRS. HAYDU: Yes.

MR. MINKUS: You also realize, of course, that you must give the defendant the benefit of this presumption of innocence without any mental reservation whatsoever?

MRS. HAYDU: Yes.

MR. MINKUS: And that you are to consider this presumption of innocence as actual proof of innocence until it is overcome by proof of guilt beyond a reasonable doubt?

MRS. HAYDU: Yes.

MR. MINKUS: In other words, to a moral certainty, to your moral certainty.

MRS. HAYDU: (Juror nods head.)

MR. MINKUS: Mrs. Jacobson, did you hear the questions I asked of Mrs. Jamal?

MRS. JACOBSON: Yes, I did.

MR. MINKUS: Would your answers be substantially the same?

MRS. JACOBSON: Yes.

MR. MINKUS: You further understand that all of the elements of the crime charged must be proven beyond a reasonable doubt?

In other words, the Judge will tell you what the elements of this case are and each one of them must be proved beyond a reasonable doubt, and that if one element is not proven, would you then vote not guilty?

MRS. JACOBSON: Yes.

MR. MINKUS: You seem to hesitate.

MRS. JACOBSON: Because it has to be proven, yes.

MR. MINKUS: You understand, do you not, that the burden of proving the defendant guilty beyond a reasonable doubt rests with the prosecution?

MRS. JACOBSON: (Juror nods head.)

MR. MINKUS: And that the accused need not introduce any evidence whatsoever?

MRS. JACOBSON: Yes.

MR. MINKUS: In other words, if we stop right here and

the State's attorney finishes and we don't say another word, it is his job to prove the defendant guilty beyond a reasonable doubt.

MRS. JACOBSON: That's right.

MR. MINKUS: To a moral certainty.

MRS. JACOBSON: That's right.

MR. MINKUS: Even if it's just circumstantial evidence.

MRS. JACOBSON: That's right.

MR. MINKUS: And that circumstantial evidence is subject to any other reasonable explanation in your mind that would say the defendant is not guilty?

In other words, if there's a reasonable explanation that you might come to, other than the guilt of the defendant, would you find him not guilty, even if he didn't say one word?

MRS. JACOBSON: After hearing all the case and everything, yes, I'd say he wasn't guilty.

MR. MINKUS: Knowing that, would you require the accused at any time to satisfy you as to his innocence?

MRS. JACOBSON: That's up to the Court.

MR. MINKUS: No, that's up to you.

MRS. JACOBSON: If you are going to prove it by all the evidence that is in and everything, then me on the jury, I have to make a decision from all the evidence heard that he is not guilty.

MR. MINKUS: But at any time, before this case is over with, before you have heard all the evidence, at any time, would you require him to satisfy you as to his innocence?

MRS. JACOBSON: Through what I have heard, I believe that he would have done that by the time everything is in.

MR. MINKUS: All right.

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(Tr. 81)

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MR. MINKUS: Did you hear the list of witnesses that will be called on this particular case?

MRS. HAMPTON: No, we didn't.

MR. MINKUS: Well, may I have it? May I have the list of any witnesses?

MR. MCWILLIAMS: Judge, I don't have a list of any witnesses that will be called; I have a list of names that could be called, if necessary.

THE COURT: Read them out, please, Mr. McWilliams.
MR. MCWILLIAMS: I did have it. Here they are.

Caroline Kelly;
Dr. Aftab Khan;
Dr. Sturge;
Dr. Fogel;
Madeline Keith;
Suzanne McClain;
Sgt. Marshall Frank;
Linda Maness;
Lt. Norris;
Sherry Bliffert.

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(Tr. 95)

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Ladies and gentlemen of the jury, this is opening statement. It's a preview of what the State intends to prove in its case. I am just giving you an outline of what the testimony will show.

It also becomes my duty at this time to read the charge against the defendant from this piece of paper which is the vehicle which brings the defendant before the Court. This is the information, it's called.

The information charges:

> "In the name and by authority of the State of Florida: Richard E. Gerstein, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that Gary Maness on the 14th day of April, 1971, in the county and State aforesaid, by his act, procurement or culpable negligence, did make an assault upon one Misty L. Maness with his hands and fists, thereby inflicting mortal wounds from which said mortal wounds she languished and died on April 18, 1971, a further and more particular description thereof being to the State Attorney unknown, in violation to Section 782.07 Florida Statutes."

Now, what I tell you is not evidence. What Mr. Minkus tells you is not evidence. The evidence comes from the witness stand, from the witnesses who are under oath. The lawyers don't testify in the case.

And, again, I want to bring this to your attention. The case, a trial like this one, is not a fight between two lawyers. There's only one purpose for the witness standing there on the direct and cross-examination, searching for the truth.

The testimony will show that prior to April 14, 1971, the defendant and his wife, Linda Maness, were separated; that approximately a month before April 14, she returned from Texas to come and live with the defendant, Gary Maness, in his base at Homestead Air Force Base, where he was stationed in the service.

Testimony will show that Gary Maness made certain statements to some of the State's witnesses; that he was unhappy with marriage; that he was not cut out for it; that he didn't want the responsibility of married life; didn't want anything to do with his wife or the child.

The testimony will show that several weeks prior, within the month that Linda Maness and the child had returned, several of the State's witnesses had seen certain instances, like for instance one time when the defendant, Gary Maness, and the child, Misty Maness, were in the car together. One of the witnesses saw the defendant grab the arm of Misty Maness, who was about six and a half months old, the left arm, and jerk the child to the front of the car.

You will also hear testimony that at one time the defendant struck the child in the right leg.

You will also hear testimony that on April 14, the defendant, Gary Maness, and his wife, Linda Maness, brought the child, Misty, to the base, where they confronted Dr. Sturge.

At that time, Dr. Sturge will testify that the child had large bruises on both cheeks and a bruise on the forehead, and was comatose, what they call comatose.

They will explain the medical terminology, unconscious, not responsive to any kind of stimulants.

And upon making his examination, he immediately called Jackson Memorial Hospital to get a specialist involved to take care of the child, Dr. Fogel. He was the specialist that was called and the child was transported down to Jackson Memorial Hospital. And when he observed the child on the night of April 14th, in the evening hours, he noticed the big bruises on the cheek and big bruise on the forehead and he also noticed the distention in one of the arms, it looked a little crooked.

He will tell you his qualifications; that he is associate dean

of medicine at the University of Miami. He's had extensive training. He is a pediatrician, a child doctor, who is a specialist in his field.

And at that time, he suspected what he will tell you is a battered child syndrome and he will explain what that means.

And to further investigate and try to save the life of the child, he had full X-rays run, whereupon he discovered a broken leg, a healing, old fracture of the leg; a broken arm; and severe head injuries.

You will hear testimony from him about what the battered child syndrome is, what kind of history goes into this thing, so that you can completely understand what the nature of this difficulty is.

He will tell you he diagnosed this particular case as a battered child syndrome.

Shortly thereafter, on April 18th, the child died in the hospital.

You will hear testimony from Dr. Aftab Khan, who is the medical examiner, the man who does the autopsy. He will testify that he made a complete postmortem examination, and that the cause of death was severe trauma to the head, or blows, blows to the head of the child.

You will see photographs of the blows and the wounds and the bruises.

You will also hear testimony from Sgt. Marshall Frank, professional detective in the Public Safety Department, Homicide Squad. He will tell you that after completing his investigation, he arrested the defendant, Gary Maness, brought him to the police station and was in the process of going through whatever they do when they arrest people up in the police office up there, when the defendant stated to him words to the effect that, "What will happen to me if I confess?"

At which time, Sgt. Frank will tell you, he warned him of the possible penalties; he warned him what he was getting himself into; gave him his full and complete Constitutional warnings.

You will see a piece of paper that the defendant signed that he had been completely advised of all his rights, and you will hear that confession, which was made on April 26th, and that the original incident happened on the 14th, in which confession the defendant says——

MR. MINKUS: I object to the term "confession," your Honor. Statement.

THE COURT: Sustained.

MR. MINKUS: It's prejudicial.

MR. MCWILLIAMS: You will hear the contents of that statement, in which the defendant, Gary Maness, stated that on the date in question, after his wife had gone to the store, he went in the bedroom and he lost his cool and struck the child at least twice on the face.

You will hear the questions asked him:

"Do you know what caused the death? What caused the blows to the head?"

He will indicate, "Yes."

And you will hear the entire statement where he indicates he is directly responsible for the death of that child, because he lost his cool and he slapped that child.

Then you will hear the testimony about prior incidents of violence between the defendant and the child, which you will be able to dovetail in with the battered child syndrome, which Dr. Fogel will explain to you.

At the end of the case the State will have proven to you beyond and to the exclusion of every reasonable doubt that this defendant and this defendant alone is guilty of manslaughter, beyond and to the exclusion of every reasonable doubt.

Thank you.

MR. MINKUS: Ladies and gentlemen of the jury, it's true Gary Maness made the statement to the police, number one; and that statement is untrue. We'll show that it's untrue.

And, furthermore, we will demonstrate to you why he made that particular statement, a statement any one of you might have made had you been in his position.

Not only that, will we show you that he made that statement and that it wasn't true and he had every reason to make it, but further, we will show who, in fact, probably did kill the child.

That's all I have to say to you.

MR. MCWILLIAMS: State would call Caroline Kelly.

THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)

Thereupon——

CAROLINE KELLY

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Would you please state your name.
A. Caroline Ann Kelly.
Q. Would you face the jury?
Did you know one Misty L. Maness?
A. I had on occasion seen her.
Q. All right.
How did you know her?
A. She lived below me with her parents in the apartment.
Q. Let me show you what's being marked into evidence 1-A, a photograph.

(Thereupon, the photograph referred to was marked State's Exhibit 1-A for Identification.)

Q. (By MR. MCWILLIAMS) Let me show you a photograph and ask you if you can identify the body in the photograph?
A. Yes.
Q. Is that Misty L. Maness?
A. Yes.
Q. Is that you in the photograph?
A. Yes.
Q. Was this taken at the medical examiner's office?
A. Correct.

MR. MCWILLIAMS: State would move to introduce 1-A for Identification into evidence, the identification photograph.
THE COURT: Any objection, counsel?
MR. MINKUS: There's no objection at this time.
THE COURT: Introduced.

State's Exhibit 1-A for Identification becomes State's Exhibit 1.

(Thereupon, State's Exhibit 1-A for Identification was marked State's Exhibit 1.)

MR. MCWILLIAMS: Your Honor, we'll turn this witness over for cross-examination. I'd like the right to recall her in

chronological sequence. She is only for the purpose of identification.
THE COURT: At this point, you mean?
All right, counsel.
MR. MCWILLIAMS: You may inquire.
THE COURT: On identification only.
MR. MINKUS: I have no questions.
THE COURT: Who do you want her to tell to come in?
MR. MCWILLIAMS: Dr. Aftab Khan.
THE COURT: Dr. who?
MR. MCWILLIAMS: Dr. Khan.
THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)
Thereupon——

DR. AFTAB A. KHAN

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Please face the jury and state your name.
A. Dr. Aftab A. Khan.
Q. What is your occupation?
A. Deputy Medical Examiner.
Q. Are you a licensed medical practictioner, a doctor?
A. Yes.
Q. What does the job medical examiner entail? What do you do?
A. I perform postmortem examination of victims of violent, sudden or unexpected deaths.
Q. Tell the jury what a postmortem examination is.
A. External, internal, and a chemical examination of the body, deceased body.
Q. Is that to determine the cause of death?
A. To determine the cause of death.
Q. Let me show you State's Exhibit 1, a photograph, and ask you if you can identify the body in that photograph.
A. Yes, I can.
Q. Did you conduct an autopsy on the person in the photograph, Misty L. Maness?

A. Yes, I did.
Q. When did you conduct that autopsy?
A. I believe on the 19th of April of this year.
Q. Where did you conduct that autopsy?
A. At the medical examiner's office, at Jackson Memorial Hospital.
Q. Did you perform an external examination.
A. Yes, I did.
Q. Would you tell the jury what your external examination revealed.
A. The body bore several marks of violence. They were primarily about the face. They consisted of bruises covering the entire left half of the face, more prominent on the prominence of the cheek, the tip of the nose and the forehead area.
Similar bruises were also seen on the right side.
Q. Would you describe to the jury, as best you can, the nature of the bruises you observed about the head, indicating for the jury on your own face where each bruise was and what it looked like to you?
A. The bruises were all over the left side of the face, more prominent on the prominence of the left cheek and prominence of the forehead.
These were areas of bluish discoloration that are seen a few days after injury.
The bruises were also observable on the outside and inside of the lips, which is observed more when the injury is sustained on the outer aspect of the lips.
Q. Were these small or large bruises?
A. They were sort of irregular islands of bruises covering the entire face. The prominent areas were smaller.
Q. Did you have occasion to notice any bruise on the forehead?
A. There was a bruise in the midforehead.
Q. Would you tell the jury the nature of that bruise, please.
A. It was approximately one and a half inches in diameter and in the midforehead, right over in this region (indicating).
Q. Did you happen to notice any bruises on the cheeks?
A. Would you repeat that again?
Q. Did you notice any bruises on the cheeks?
A. Yes. There were bruises on the left and right cheek both; more prominent on the left side than on the right.

Q. What, if anything, did you notice about Misty Maness' ankle?
A. Ankle?
Q. Yes.
A. I don't recall.

May I see the protocol, my own?
MR. MCWILLIAMS: I'll strike that question.

A. (Continuing) Oh, yes. The left ankle had a——

MR. MINKUS: I object, your Honor. There's no question that's been propounded to the doctor at this particular time.
THE COURT: Sustained.
MR. MCWILLIAMS: I'll withdraw the question.

Q. (By MR. MCWILLIAMS) Did you have occasion to perform an internal examination?
A. Yes, I did.
Q. Would you tell the jury the results of your internal examination and what an internal examination is?
A. The internal examination consists of opening up the body cavities and observing whatever nature of disease is present on the body of the deceased.
In this particular instance there were patchy area of bleeding inside the head as a result of the trauma to the left side of the face.
Q. Would you tell the jury where these areas of patchy bleeding were?
A. The brain is covered by three distinct membranes.
The injuries sustained to the head, usually the outermost membrane or dura mater shows small areas of bleeding. And these areas were seen in this particular instance, in approximately this area (indicating).
They are within the brain, of course, within the cranial cavity or the head cavity, but behind the surface of the brain.
Q. Did you conduct an internal examination on any of the extremities, the arms or the legs?
A. Yes.
Q. Would you tell the jury what your internal examination revealed?
A. The child had a spiral type of a fracture of the left arm.
Q. Would you tell the jury in layman's terms what that is?

A. Fracture is the breaking of the bone and spiral is just the configuration of the thing. It's a spiral sort of fracture.

Q. Where was this fracture located?

A. In the arm.

Q. Which arm?

A. Left arm.

Q. Tell the jury where that break was.

A. The area between the shoulder and the elbow is technically the arm; below that is the forearm.

This was located in the arm, and the spiral was going in this direction (indicating).

This was a fairly recent fracture.

Q. When you say "fairly recent," Doctor, can you give any time limits?

A. Taking everything into consideration, I would say this was approximately four days to two weeks in duration. Between four days and two weeks.

Q. Did you have occasion to conduct an internal examination on the leg?

A. Yes, I did.

Q. Tell the jury what your examination revealed.

A. The right leg, the lower portion of the right thigh had a healing fracture.

Q. Where on the thigh, front or back?

A. The fracture was complete. It was healing all around. The bone had fractured all over and there was a healing reaction taking place all around.

Q. Show the jury, if you would, where the break was, which area, which way the crack went.

A. The right thighbone and approximately just about here, a few inches above the knee joint.

Q. Was this a small or a large fracture?

A. It was a complete fracture.

Q. Were you able to determine the approximate time limits of this?

A. Yes. I have given the time as approximately between 3 and 6 weeks, a minimum of 3 weeks and a maximum of 6 weeks.

Q. Were you, within a reasonable medical certainty, able to determine from your postmortem examination the cause of death of Misty Maness?

A. Yes.

Q. Would you tell the jury what the cause of death was.

A. Blunt injury to the head and its subsequent complications.

Q. How long did it take for the child to die?

You didn't treat the child, is that right?

A. I did not treat the child, no.

Q. Let me ask you this: Were the bruises that you observed consistent with blows to the head or checks?

A. They are consistent with blows to the head and cheeks.

Q. When you say "a blunt object," would that be consistent with a hand or fist, rather than a sharp, pointed object?

A. It is definitely not a sharp object.

MR. MCWILLIAMS: If you will give me just a moment, your Honor.

Q. (By MR. MCWILLIAMS) What, if anything, did you notice about the lip of Misty Maness?

A. The inside surface of the left half of both the lips showed areas of contusions.

Q. Tell the jury, please, what "contusion" is.

A. A contusion is a bruise.

Also, a small, thin segment of skin which is called frenulum. That was also infected.

Q. What's the frenulum? Show the jury.

A. Approximately in the midline here. If you take your tongue and try to press, you will see a small shape of mucous membrane, or film of skin.

It is present in both the upper and lower lips.

Q. Was there any sign of tearing on it?

A. Yes, it was torn and infected.

Q. Were you able to determine how recent this injury was?

A. It would be a couple of days to several weeks.

Q. Was your conclusion as to the cause of death, was it directed more to one particular wound of the head or was it a combination of all of the wounds to the head?

A. A combination of the total injury to the head.

MR. MCWILLIAMS: You may inquire.

CROSS EXAMINATION

By MR. MINKUS:

Q. Dr. Khan, could these injuries to the baby's head have been caused by two slaps in the face?

A. Highly unlikely, no.

Q. You stated in your medical report that the baby had a fracture of the left humerus, which is——

A. Arm.

Q. Arm—which is this area right in there (indicating), is that correct?

I am indicating the elbow to the shoulder.

A. Between the shoulder joint and the elbow joint is the arm.

Q. Doesn't medical authority have the opinion that such a fracture is caused by a sharp blow or from a fall?

MR. MCWILLIAMS: Objection to the form of that question. If you will read it back——

THE COURT: Sustained.

Q. (By MR. MINKUS) You are familiar with fractures, aren't you, Doctor?

A. Yes, I am.

Q. And they are caused?

A. Yes.

Q. Are you able to formulate an opinion as to how this fracture occurred?

MR. MCWILLIAMS: Objection. That's beyond the realm of his examination.

THE COURT: The doctor is an expert. Let's see if he can answer it. If he can't, he will tell us he can't.

THE WITNESS: Do I answer?

MR. MINKUS: Yes.

A. (Continuing) All I can say is it was from trauma. I cannot say how it was sustained. But the nature of the fracture in this case was the spiraling type, which is commonly seen in a twisting of the arm.

Q. (By MR. MINKUS) Okay. Now, you gave a statement, I think, to the State's Attorney sometime ago, wherein you said that the left fracture——

MR. MCWILLIAMS: Objection to this form of impeachment. It's not proper, your Honor. He hasn't asked him——

THE COURT: If this is impeachment, sustained.

Q. (By MR. MINKUS) Did you ever make a statement to the effect that the fracture——

MR. MCWILLIAMS: Objection. He is not laying the proper predicate.

THE COURT: Are you seeking to show, counsel, that he's made a prior inconsistent statement to what he's just said?

MR. MINKUS: No, your Honor. I will withdraw the question.

Q. (By MR. MINKUS) Is it possible that a broken leg could have been caused on a date prior to your examination?

MR. MCWILLIAMS: Objection. He says he doesn't know how it was caused.

THE COURT: He hasn't discussed the broken leg.

Overruled.

THE WITNESS: Do I answer?

MR. MINKUS: Yes.

A. (Continuing) I said between three and six weeks. Other than this, I couldn't be sure.

Q. (By MR. MINKUS) Would you say that somebody taking care of the child would have known there was something wrong with the leg at that particular time?

MR. MCWILLIAMS: Objection.

THE COURT: Sustained.

Q. (By MR. MINKUS) As a doctor, do you have an opinion with regard to the knowledge that an observer might have with respect to the injury of one's leg after it has sustained such a fracture?

Q. (By MR. MCWILLIAMS) Objection. Calls for speculation.

MR. MINKUS: It's a hypothetical question, your Honor.

MR. MCWILLIAMS: He can testify to what his observation of the injury was.

MR. MINKUS: I am asking him a hypothetical question.

THE COURT: Sustained as to what someone else might observe. As an expert, he can testify as to what the condition would be, but I don't think he can testify as to what someone else can see.

Q. (By MR. MINKUS) Do you have an opinion as to what the condition of that leg would be at that particular time, or at the time it sustained the fracture?

A. The child should show symptoms of the injury, like if the child was held close to the leg, it might start crying. It

may not crawl as well as it used to. The person who moved the child should be able to suspect injury.

MR. MINKUS: Okay. That's all, your Honor.
MR. MCWILLIAMS: One other question.

REDIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Would two minor slaps of the face produce the bluing or the bruises that you observed?
A. Not two.
Q. Would severe blows with a fist or severe blows to the head with an open hand produce such injuries as you observed?
A. Yes, they would.

MR. MCWILLIAMS: I have no further questions.
MR. MINKUS: I have no questions.
THE COURT: Who do you want him to send in, Mr. McWilliams?
A. Dr. Sturge.
THE COURT: May he be excused?
MR. MINKUS: Yes.
Thank you very much, Doctor. We appreciate your coming.
THE COURT: Sent in Dr. Sturge, please.
THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)
Thereupon——

CARL STURGE

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Doctor, would you please face the jury and tell them your name.
A. Carl Sturge, Lieutenant Colonel, U.S. Air Force.
Q. What is your official position in the Army?

A. I am one of the surgeons stationed at Homestead Air Force Base, Florida.
Q. Directing your attention to April 14, 1971, did you have occasion to see the defendant, Gary Maness?
A. Yes, I did.
Q. Do you see him in the courtroom?
A. Yes, I do.
Q. Would you point to him, please.
A. (Witness responds.)

MR. MCWILLIAMS: Indicating the defendant, for the record.

Q. (By MR. MCWILLIAMS) Would you please tell the jury the time and the circumstances under which you observed the defendant.
A. On the evening of the 14th, I was the physician in charge of the emergency room at Homestead.
Gary Maness and his wife brought a baby into the emergency room because the baby needed medical help.
Due to the fact I was the physician on duty, I was called to see the child.
Q. Would you tell the jury your first observations of the physical condition of the child.
A. I saw the child immediately after she was brought in. She was brought in and presented at the desk that we have there at the emergency room. Either Gary or the wife said, "We would like our baby checked."
Immediately at that, the nurse took a look at the baby and put them in a room.
Q. What time was this, Doctor?
A. This was approximately 6:03. We have a record here that the baby came into the room.
Q. Right.
Now, tell the jury what your initial examination was.
A. Well, immediately upon walking into the room, which was a matter of seconds, the child was brought in. The child was completely comatose. By that, I mean it was not responding to any stimulus whatsoever.
I tried to provoke a reaction from the child by pinching it on the chest or pinching its toes or something, to try to get the child to respond. But, rather, the child just laid there like a limp child with very labored respirations.
It was also obvious by—— Do you want me to go into depth?

Q. Tell the jury what you observed.

A. Well, the child was very severely injured. There were multiple body and facial injuries. One eye was swollen.

Q. Tell the jury, to the best of your recollection, each injury that you recall seeing and try and describe it to them, because they weren't there.

A. Okay.

There were multiple bruises about the face. One eye was swollen closed, that the child could not open the eye, even if she had the ability to do so.

There were also multiple bruises about the cheeks. There were bruises around the shoulder and collarbone area and some bruises on the chest and some bruises on the lower extremities. One arm appeared to be held at a somewhat grotesque angle. I suspected the child had a broken arm. I did not have the capability of doing X-rays, but as I ran my hand down the legs, I suspected possibly a broken leg.

I was not sure whether a broken collarbone existed, but theoretically, in my mind, I suspected she had a broken collarbone.

Q. Did you talk with Gary Maness about how these injuries occurred?

A. This was all sequential.

I was saying, "Tell me what happened."

Any Gary said that the child had a habit of beating itself against the side of the crib and also hitting itself with its bottle.

This was happening all sequential.

And another finding at this point is that the pupils were fixed and dilated and this is a neurological sign that somewhere along the line severe intercranial—in other words, severe injury had taken place.

I made mention to Gary at this point, and the reason I spoke directly to Gary is because his wife appeared to be quite nervous and upset, whereas Gary didn't appear to be observing what was going on.

MR. MINKUS: I object to that remark. I move that all that be stricken, as applies to Gary.

THE COURT: Overrule the observations; sustained to the thoughts.

Q. (By MR. MCWILLIAMS). All right.

Just tell the jury what you observed and the conversation.

A. I was directing my comment to Gary because he seemed to be the member of the family that——

MR. MINKUS: I object.

THE COURT: Sustained to what "he seemed to be."

You can describe how he was acting, as compared to some other person.

A. (Continuing) As I say, Gary was acting very nonchalant.

Q. (By MR. MCWILLIAMS) Who did most of the talking?

A. Gary did.

Q. How long have you been a surgeon?

A. Since 1964.

I shined my light in the baby's eyes and the pupils were fixed and dilated. This told me the baby had a severe inside-the-head injury, so I made the comment, "Look——"

MR. MINKUS: I object to what he made the comment.

THE COURT: Were these conversations to the defendant?

MR. MCWILLIAMS: They are admissible.

THE WITNESS: Yes.

THE COURT: Overruled.

A. (Continuing) I said, "Gary, tell me the truth, how this baby was injured. This baby did not sustain the injuries in the manner you are describing. This baby is dying and I have to know how the baby sustained the injuries."

With that, Gary said, "We didn't have anything to do with it."

Q. (By MR. MCWILLIAMS) Were these blows consistent with falling in the crib?

A. Not, not falling in the crib, no.

Q. Were these bruises that you observed consistent with striking one's self with a bottle?

A. No.

Q. What would be a proper analogy of how——

MR. MINKUS: I object to the form of the question of an analogy.

THE COURT: Sustained.

Q. (By MR. MCWILLIAMS) Could a baby hit himself in the head——

MR. MINKUS: I object to it.

THE COURT: Sustained to the phraseology.

Q. (By Mr. McWilliams) Was the nature of these wounds consistent with any type of self infliction?

Mr. Minkus: I object.
The Court: Overruled.
Mr. Minkus: Calls for a conjecture and calls for a medical opinion, which he has to lay a foundation for.
The Court: Qualify him as an expert.

Q. (By Mr. McWilliams) How long have you been a doctor?
A. Since 1961.
Q. Where did you obtain your college degree?

Mr. Minkus: I stipulate to the qualifications.
The Court: All right.

Q. (By Mr. McWilliams) All right.
Would you tell the jury whether or not these injuries were consistent with any self-inflicted wounds by that child.
A. It is impossible that a six- or seven-month-old child could beat itself with anything to sustain these injuries.
Q. Did you then contact the Jackson Memorial Hospital and arrange for emergency treatment?
A. Yes, within a matter of moments.
Q. Did this occur in Dade County, Florida?
A. Yes.

Mr. McWilliams: You may inquire.

Cross Examination

By Mr. Minkus:

Q. Was Mrs. Maness present when these questions were asked of Gary Maness?
A. Yes.
Q. What did she reply?
A. I don't believe she did any talking whatsoever.

Mr. Minkus: I have no other questions.
Mr. McWilliams: State would call Dr. Fogel.
The Court: All right.
Dr. Sturge, would you ask Dr. Fogel to come in, please.
Mr. McWilliams: Can this doctor be excused?
The Court: Counsel, any objection?
Mr. Minkus: No.
The Clerk: Would you raise your right hand, please.

(Thereupon, the witness was sworn.)
Thereupon——

Dr. Bernard J. Fogel

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McWilliams:

Q. Would you please face the jury and tell them your name, Doctor.
A. Dr. Bernard J. Fogel.
Q. What is your occupation?
A. I am a pediatrician. I am associate dean of the University of Miami School of Medicine and associate professor of pediatrics at the University of Miami School of Medicine.
Q. How long have you been teaching pediatrics?
A. 10 years.
Q. During the course of your duties, did you have occasion to see Misty Maness, the victim in this case?
A. Yes.
Q. Would you tell the jury when, where and under what circumstances you first saw that child.
A. On April 14th, when I returned from the Broward County Pediatric Society, I had a call at home at approximately 11 o'clock that there was a patient that had been admitted that was admitted from Homestead Air Force Base, in my name. And I was asked to come and see the child and take care of the child at that time.
Q. What time did you first see the child?
A. About 11:35. I guess it took half an hour to get from home to Jackson.
Q. Who, if anybody, was with that child?
A. Who was with the child at that time?
Q. Yes.
A. Well, there was a whole group of house staff, officers, residents, and interns that were with the child. The parents were outside of the room. And, of course, there were nurses and attendants.
Q. Tell the jury what your examination, your initial examination of the child, revealed.

A. The child when I examined her at first, she was comatose. She had——

Q. Would you explain that to the jury in layman's terms?

A. The child was not reacting to any stimulus, whether it be painful stimulus or any other type of stimulus. She was not responding to noise, light, to any type of reaction at all.

She was, at that point, completely nonresponsive in any way, shape or form.

She had multiple bruises covering the upper chest and shoulders, but primarily around the face and the head, with bruises severely around the outside, or the orbits of the eye.

She had her left arm in a strange position. It was turned sort of like this (indicating); even though there was very little spontaneous movement of the child, it was obvious that she was not attempting to move that arm.

Q. All right.

What did you do? What did you then check for?

A. We then tried to see whether or not this child had any reason for what we suspected as bleeding into her brain, or whether she had abnormal bleeding; for example, a hemophiliac patient or leukemic patient, to see if there was some spontaneous reason for bleeding that had caused her condition.

Q. What did you do in order to look for those symptoms?

A. We did a number of laboratory tests which would prove that she could stop herself from bleeding if she had bled from some natural cause. But she had no reasons—or we had no reasons to believe from any of the tests that we performed that she had a bleeding disorder and that all of these bruises must have been caused by some form of accident, either falling or car accident or something of that nature.

Q. Did you have conversations with the parents at that time?

A. Yes.

Q. Whom did you primarily speak with?

A. I spoke with both parents and informed both parents at that time that we had called protective custody. That was late at night, so that it was the next morning that they were actually called, that we had suspected the child had

been in either a severe accident and whether they knew the child was in an accident, meaning a car accident or something of that nature, or that the child had been beaten up by somebody.

I specifically asked both parents, who were together, what they knew about this.

Now, they were in a state of semi-shock and were obviously quite afraid. The parents tended to——

MR. MINKUS: I object to the statement, "They were quite afraid."

THE COURT: Sustained.

Q. (By MR. MCWILLIAMS) What did they tell you? What did Gary Maness tell you?

A. Gary Maness told us that the child had been well up until the evening about 4 or 5 o'clock, when they noticed the child was not responsive and was not reacting normally and was breathing irregularly and might have been having convulsions.

The mother stated virtually the same thing. And they said that, apparently, the child was well until that afternoon when the mother left the house and was gone for a period of two, three or four hours.

Q. Did Gary Maness give you any explanation as to the bruises on the child's face?

A. Yes, both parents gave me the same explanation as to the bruises on the face. The explanation was that the child hit itself with the bottle, or that it would bang itself against the crib; or that it would bang itself against the floor.

Q. As a practitioner of pediatrics for 10 years, were these wounds that you observed consistent with the story told to you by Gary Maness?

A. I have seen about 10 children who have been severely beaten and I have never seen a child beaten to this degree. I have seen many children who have fallen from high places and all kinds of places and I have never seen a child sustain injuries to this degree from any form of either hitting itself with a bottle or falling against a crib or just tumbling over.

Q. In other words, Doctor, did you rule out accidental means of infliction of these wounds?

A. To the best that we could—accidental to the extent that the baby had self-inflicted it, yes.

Accidental to the extent that as we told the parent, "Did this happen in a car accident? Was the baby thrown against it," they totally denied any of this, so that the baby could not have self-inflicted any of this injury.

Q. All right.

Doctor, did you have occasion to look for any old fractures?

A. Yes, we did.

Q. Would you tell the jury why you would look for old fractures?

A. After ruling out the possibility that this child had sustained this bleeding naturally, we felt that the child might be a battered child syndrome. In fact, it was the opinion of everyone who saw the child in the hospital that it was a battered child syndrome.

The battered child syndrome——

Q. Explain to the jury what that is and how it comes about.

A. This has been described, now, for a period of about 15 years. It's really nothing more than child beating. It can take many forms, from the form of just beating the child with one's fists, to slapping the child excessively, burning the child, throwing the child up against a wall.

But it is generally the loss of temper of the parents or——

MR. MINKUS: I object to that last part, "generally the loss of temper of the parents."

THE COURT: Sustained as to whom.

MR. MCWILLIAMS: All right.

A. (Continuing) It is generally the loss of control of some individuals, because the child could be battered by a baby-sitter or by anybody else.

Q. (By MR. MCWILLIAMS) Does the battered child syndrome normally encompass just one incident, or is it a history of repetitive acts?

A. Well, most of the time one will see it in the first child, and then will see it repeated to a certain degree in subsequent children, if the parents have not been—or the person who took care of the child, or whoever sustained the injury, whoever it happened to be—caught doing it.

Q. And so——

A. We find evidence that in most instances this is something that is repeated amongst other children in the family.

Although, occasionally, it will be one child that is selected out and battered.

Q. Would you tell the jury why you began looking for old fractures in the child?

A. One of the most common evidences which one can find, other than just the bruises, is the fact that children's bones are relatively brittle, and under certain circumstances that fractures can occur in places that you don't generally suspect them. So that the child in being beaten or injured in whichever way it's injured, many times sustains fractures.

And this child had a fracture of the right arm—the left arm, excuse me—and the left upper leg.

The left upper leg was a healing fracture which had been sustained one, two or three weeks before. We can't exactly say when that fracture had occurred.

Q. In other words, did you look for these old fractures to see if there were any other repetitive acts which would be consistent with battered child syndrome?

A. Yes.

Q. Doctor, in your experience, how many times have you seen a battered child syndrome?

A. I would say that I have seen it at least 10 times, and possibly more than a dozen times.

Q. Would you explain to the jury what the word "syndrome" means?

A. Syndrome is just a group of associated conditions which puts the disease category under one name. This is generally in this situation; broken bones; bruises; maybe, as we suspected in this child, subdural hematomas or bleeding into the skull; and other evidence that the child has had multiple traumas inflicted upon it in some way.

Q. In your 10 years as a pediatrician and in your prior experience with the 10 battered child syndromes that you have seen, did your investigation reveal other incidents of violence in perpetrators of these battered children?

A. Most of the time. In individuals who actually inflicted these type of injuries upon children, there's evidence in their past histories that they have done so to other human beings, or other individuals of one sort or another.

Q. In other words, if testimony would produce some other acts of violence against the child or other related things or bodies, would that be consistent with the child battered syndrome?

A. Yes.

MR. MCWILLIAMS: You may inquire.

CROSS EXAMINATION

By MR. MINKUS:

Q. Did you speak to anybody today when you came to court?
A. Did I speak to anyone?
Q. Yes, about your testimony.
A. To the attorney here.
Q. Did you go over your testimony with him?
A. No, in what way? Do you mean did I go over my testimony with him?
Q. Did you rehearse your testimony with him?

MR. MCWILLIAMS: Objection to the form "rehearse."
THE COURT: Sustained.

Q. (By MR. MINKUS) Well, did he ask you what you saw, what occurred?
A. He just asked what had occurred at the time, just as he has done right now. We did not go over any answers and he did not ask me any leading questions or ask me to say anything.

MR. MINKUS: Okay. I have no other questions.
THE COURT: May he be excused?
MR. MCWILLIAMS: Yes, your Honor.
THE COURT: Counsel?
MR. MINKUS: Yes, he may be excused.
Thank you very much, Doctor.
THE COURT: Who do you want next? Who do you want him to send in?
MR. MCWILLIAMS: Madeline Keith.
THE COURT: Madeline Keith.

(Thereupon, the witness was sworn.)

Thereupon——

MADELINE KEITH

was called as a witness on behalf of the State of Florida and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Would you please face the jury and tell them your name.
A. Madeline Keith.
Q. Do you know the defendant, Gary Maness?
A. I met him, that's all.
Q. Do you see him in this courtroom? Look around the courtroom.
A. Yes.
Q. Where is he?
A. Right there.

MR. MCWILLIAMS: Indicating the defendant, for the record.

Q. (By MR. MCWILLIAMS) Do you remember approximately when you met the defendant?
A. Yes, it was during——

MR. MINKUS: Excuse me, your Honor. I understand there is a possible witness who was in court at this particular time, a man who was witness to some of the conversations, some of the statements.
SGT. DUCKWORTH: If you are referring to me, Sgt. Duckworth, I have not been subpoenaed or involved in this case, except one time I was there.
I am involved in a case across the court, your Honor.
MR. MCWILLIAMS: He is not my witness.
MR. MINKUS: Did you have occasion——
MR. MCWILLIAMS: Objection. This is right in the middle of my testimony.
THE COURT: Let's not have interrogation.
Are you planning on calling Sgt. Duckworth as your witness?
MR. MCWILLIAMS: No, your Honor.
SGT. DUCKWORTH: I will leave, your Honor.
THE COURT: All right.
Thank you.

Q. (By MR. MCWILLIAMS) Would you please tell the jury when and where you met the defendant, Gary Maness?
A. I met him about the last of March, over at McClain's home.

Q. Who is McClain?
A. They were some friends of ours.
Q. Where do they live in relation to Gary Maness?
A. Well, you mean the address?
Q. I mean, was it next door or across the street?
A. In the same town, Homestead.
Q. Did you ever have occasion to see Misty Maness, the victim in this case, the little girl?
A. Just in the car.
Q. All right.
Who was in the car?
A. His wife was and he was standing outside the car.
Q. What do you mean "he"? Who do you mean?
A. Gary was standing outside the car.
Q. What, if anything, unusual did you witness happen between Gary Maness and the little girl, Misty Maness?
A. Well, when I went out to the car, I mean, the baby was hurt. I could tell that. He didn't show much concern for the child, because——

MR. MINKUS: I object to the word "show."
THE COURT: Sustained.

Q. (By MR. MCWILLIAMS) Well, tell the jury, first of all, when you looked at the baby, tell the jury what you saw.
A. Well, I looked at the child and the child was sitting in the car seat in the car, and it was just sitting there. It didn't look like it could move. Its whole side of its face—its eye was all hurt and red and its nose was—I couldn't tell if it was broken or not, but it was pretty bad.
Its face was all bruised and red.
Q. Did Gary Maness say anything about the condition of the baby?
A. Well, he was laughing about it and he says it looks like he's been beating it again.
Q. How did that conversation happen to come up with you?
A. Well, he come in the McClain apartment and Mrs. McClain asked to see the child.
He says, "Well, you don't want to see it right now because it looks like it's been beaten again, but it really hasn't."
And she says, "Well, what do you mean by that?"
He says, "Well, it fell off our bed." And he says, "It bruised the side of its face a couple of days ago and the

bruises are just coming up, so we can see them. So, we are taking her to the hospital."
Q. Did he say, "It looks as if it's been beaten again," or "It looks as if I have been beating him again"?

MR. MINKUS: I object. That's leading.

Q. (By MR. MCWILLIAMS) To the best of your recollection, will you tell the jury in your own words, as best you can remember, what the words were?
A. I can't.

MR. MINKUS: She's answered that already, your Honor.
THE COURT: Sustained. Repetitious.

Q. (By MR. MCWILLIAMS) Now, what other conversation did you have with Gary Maness?
A. Well, that was about all then.
And then, after he come back, he had borrowed our car. So, I was taking him home and he was in the car with Mrs. McClain and I.
He said the fact——
Q. He said what?
A. He said——

MR. MINKUS: I object. There's been no foundation laid when the conversation took place or who was present.
THE COURT: Sustained as to when, where and time.

Q. (By MR. MCWILLIAMS) Approximately—Was this the same time, the last of March?
A. Yes, it was the same day, about two and a half hours after I had seen him the first time.
Q. Where was this?
A. It was in downtown Homestead, because I was driving through Homestead.
Q. Who was in the car?
A. Gary and Mrs. McClain and myself.
Q. Where is Mrs. McClain today?
A. In Ohio, I guess that's where she's living.
Q. All right.
Did you have conversations concerning the child or concerning their marriage?
A. Yes.
Q. What did Gary Maness say?
A. Well, we asked him what the doctor said.

He said that the doctor had said that it was okay to take it home and to take care of it, and if it wasn't better, to bring it back.

Q. Did you have any conversations concerning his marriage status?

A. Yes.

MR. MINKUS: I object. It's leading.

Q. (By MR. MCWILLIAMS) Tell——

THE COURT: Overruled.

Q. (By MR. MCWILLIAMS) Tell the jury what he told you.

A. Yes.

We asked——Wait a minute. He said——Oh, he said we was both married and we said, "Yes."

He says, well, he just couldn't understand being married. I can't remember that part of it, exactly. Then, he says that married life just wasn't for him and he just——I am trying to get this straight. He just didn't want the responsibility of a married life, and that he was planning a divorce as soon as possible. I believe that was it.

Q. Did he make any reference to the child, whether or not he wanted the child?

MR. MINKUS: I object. That's leading.

THE COURT: Sustained.

Q. (By MR. MCWILLIAMS) Did he make any reference to the child at all?

MR. MINKUS: I object. That's leading.

MR. MCWILLIAMS: That's not leading.

THE COURT: Sustained, to the way it is phrased.

Q. (By MR. MCWILLIAMS) What, if anything, did he say concerning the child?

A. Well, he said he didn't really want the child, to care for it or care for it. But, we didn't ask him if it was a have-to married or anything like that.

I says, "Well, you don't really want him bad enough to do anything to him?"

He says, "Well, no," he just didn't want any part of married life, and that was it.

And then, we brought him home.

MR. MCWILLIAMS: You may inquire.

CROSS EXAMINATION

By MR. MINKUS:

Q. Were you at the McClains' home and Gary came over?

A. Yes.

Q. You say that Mrs. Maness was in the vehicle with the baby?

A. Yes.

Q. Where was the baby?

A. Sitting in the car seat.

Q. Which side of the seat? Where in the car exactly?

A. In the middle of the seat. She was sitting in the right-hand side of the car. The baby was in the middle, in the car seat. He was standing outside the car.

Q. Where was he standing, by the car?

A. By the driver's side of the car.

Q. What did he do?

A. He was just standing there and he was talking over the top of the car to Mrs. McClain and I.

Q. Where was Mrs. McClain and yourself?

A. We were standing over by the passenger side of the car.

Q. All right. What was said?

A. Well, we said—we was talking about the baby. And he said how it looked.

Q. What was said? What did he say to you or what did you say to him?

A. Well, just what I said.

Q. What was said?

A. That it looked like it had been beaten again, and fallen off the bed.

Q. It looked like it had been beaten and fallen off the bed?

A. Yes. I said that before.

Q. You just said that you stated that——

MR. MCWILLIAMS: Objection. He's arguing with the witness.

THE COURT: Sustained.

Ma'am, he is asking you to repeat exactly what you heard. Even though you may have said it before, repeat exactly what the conversation was.

THE WITNESS: All right.

A. (Continuing) He said—well, when he come out to the car, the baby was, you know, bruised.

He said that it had been, you know, it looked like it had been beaten again.

And then, it was, you know, had fallen off the bed is what he stated.

Q. (By Mr. Minkus) Isn't it a fact that he said to you: "It looks like the baby was in a fight and it lost"?

A. No. He never said those words at all, because I remember the fact that he said——

Mr. Minkus: I move all of that——
Mr. McWilliams: Objection. Objection.
The Court: Sustained. Sustained.
Mr. McWilliams: Wait a minute.
The Court: Sustained.
She is answering your question.
Mr. McWilliams: The witness should be allowed to complete it.

A. (Continuing) He never said nothing about a fight. That word never came up in the conversation.

Mr. Minkus: I have no other questions.
Mr. McWilliams: One other question.

Redirect Examination

By Mr. McWilliams:

Q. While he was telling you about the child and his injuries, what was his physical condition? What was he doing?

A. He was standing and laughing.

Mr. McWilliams: No further questions.
The Court: Who do you want her to send in?
Mr. McWilliams: State would call Lt. Norris.
The Court: Ma'am, would you ask Lt. Norris to come in?
The Clerk: Would you raise your right hand, please.

(Thereupon, the witness was sworn.)
Thereupon——

Robert Norris

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McWilliams:

Q. Please state your name, Lieutenant.

A. Sgt. Robert Norris.

Q. Did you have occasion—— What department are you with?

A. Public Safety Department, Homicide Section.

Q. Did you have occasion during the course of your duties to see one Misty L. Maness, the victim in this case?

A. I did.

Q. Approximately when and where?

A. It was on April 18, 1971, approximately 6:30 p.m., in the office of the medical examiner.

Q. On April 18th, was the child alive or dead?

A. She was dead.

Q. Did you have occasion to be present when any photographs of the child were taken?

A. Yes, I did.

Q. Were they taken on that date, April 18?

A. Yes, it was.

Q. Who were they taken by?

A. Sgt. Johnson of our lab bureau.

Mr. McWilliams: Let me mark these. Mark these Cumulative 1-A.
The Clerk: 1-B for Identification.
Mr. McWilliams: 1-B for Identification.

(Thereupon, the photographs referred to were marked State's Cumulative Exhibit 1-B for Identification.)

Q. (By Mr. McWilliams) I show you what has been marked 1-B for Identification, the photographs, and ask you if you can identify those photographs.

A. Yes, sir, I can.

Q. Are they the photographs that you observed being taken in your presence, of Misty Maness?

A. Yes, they are.

Q. Do they truly represent the physical condition of Misty Maness as you observed it on that date?

A. Yes, they do.

Mr. McWilliams: State moves into evidence as 1-B.
Mr. Minkus: I object to their introduction into evidence.
The Court: Grounds?

MR. MINKUS: That they are prejudicial to the defendant and that they are inflammatory.

THE COURT: Let me see them.

Let me see the other picture that is already in.

MR. MCWILLIAMS: Your Honor, I only have one black and white photo. It makes no difference whether I use the black and white or the color.

Mark this, please, 1-C.

THE CLERK: State's Exhibit 1-C for Identification.

(Thereupon, the photograph referred to was marked State's Exhibit 1-C for Identification.)

MR. MCWILLIAMS: I'd prefer to introduce them all.

THE COURT: Permit the black and white, only.

THE CLERK: Introduced?

THE COURT: Show the black and white to counsel.

He has not yet seen that or stated whether or not he has any objection to that.

MR. MCWILLIAMS: May we ask the jury be excused, your Honor?

THE COURT: Just let him answer yes or no, as to whether he has any objection.

MR. MINKUS: I do have an objection. He already introduced one photograph of this type, your Honor, and the only other purpose for which these photographs are being introduced are for inflammatory purposes.

MR. MCWILLIAMS: I would ask the jury be excused.

THE COURT: All right, ladies and gentlemen of the jury, would you step into the jury room for just a moment?

(Thereupon, at 6:00 o'clock p.m., the jury retired to the jury room.)

MR. MCWILLIAMS: Your Honor, if you will permit me, I have got several cases which indicate that if the photos tend to corroborate the physical testimony, then for that purpose of corroboration that they are entitled to be submitted to the jury.

However, if they are just inflammatory and big pictures of somebody in a pool of blood, they do not tend to corroborate physical testimony. Then they are not admissible.

In this case, the cause of death, by the defendant's own statements, and the doctors, seems to be in conflict, so certainly—the injuries, whether or not they are self-inflicted,

certainly that's corroborative of the doctor's testimony; the bruises on the face, et cetera.

A picture of them shows that these are not self-inflicted type wounds. And if your Honor will permit me, I will get that law. I have it all available at my fingertips.

THE COURT: I am familiar with it.

That's in. I was going to permit you to put the black and white 8x10 in.

MR. MCWILLIAMS: However, the black and white 8x10 does not show clearly the bruises to the eyes.

If I could select some of those which these do not portray.

There's one there, the side view of the eye and the bruise which closed the eye.

That full face just does not portray it.

THE COURT: Which one? Which one are you referring to?

MR. MCWILLIAMS: First of all, this one here, Judge, which shows a view of the left side of the face. It indicates a long bruise which is not indicated in the full face photo.

Now, there's two different photos of that particular bruise. Either one, I don't care which we use. The only ones I am concerned with are the side views.

This is another one of the same. Whichever one we use, I don't care, just so I can get to the jury there was bruises on the side of the face as well. The State is contending that the defendant slapped and bruised the child with his first or hand. The full face does not show the side views which corroborate the testimony of the medical witnesses.

MR. MINKUS: We are not contending, your Honor, that he did not—— We are saying he didn't strike the child at all. We are not contending the way the child died. We are saying he did not strike the child at all in the face.

MR. MCWILLIAMS: Then his objection is ill founded as to the admissibility of the photos.

MR. MINKUS: No. We are going to show who did strike the child.

MR. MCWILLIAMS: This is the second one which shows the side which is again not indicated in the full face.

All I want is one of the left side and the right side which shows the severity of the bruises to the face, because the defendant's statement indicates he slapped that child twice in the face.

The only thing the black and white shows, with crystal clarity, is the bruise to the forehead.

THE COURT: What is the red? Is that mercurochrome? Which is it?

MR. MCWILLIAMS: Judge, I will have the detective explain all that to the jury as to not mislead them. That's where the head has been shaved and mercurochrome applied and the injuries to the legs in this other picture is where they did the intravenous.

THE COURT: Let me see that larger one.

MR. MCWILLIAMS: None of these injuries to the groin——

THE COURT: Is this the same picture except one is in color and one is in black and white?

MR. MCWILLIAMS: Right.

Those injuries to the groin are not concerned with this case. They are part of the medical treatment and I don't intend to mislead the jury on that.

THE COURT: And the ankle?

MR. MCWILLIAMS: That's also part of the medical treatment. That's why I withdrew the question, primarily.

THE COURT: That being so, I am going to reverse myself as to the black and white and permit you to introduce just the one photo of the left and one photo of the right side.

MR. MCWILLIAMS: That's all I need. Thank you, your Honor.

THE COURT: I can't tell which is left and right.

Kindly pick one of the left and one of the right. Here.

MR. MINKUS: Note the defendant's objection.

THE COURT: But not the full body.

MR. MCWILLIAMS: Let me get it clear. The black and white of the full body?

THE COURT: Not any of the full body, in view of the proffer that you made with regard to the injuries.

MR. MCWILLIAMS: Can we do this, Judge? Since I have the two side views, but I don't have anything of the forehead, can we take any one of these and cut the bottom half off? I don't have anything showing injury to the forehead.

Now, each one of these shows injury to the cheek, but now I don't have anything showing injury to the forehead.

MR. MINKUS: Your Honor,, you made your ruling already.

THE COURT: You don't have one?

MR. MINKUS: It's just argumentative now.

MR. MCWILLIAMS: These are the two, one of each side.

THE COURT: Hand me those photos.

MR. MCWILLIAMS: We can cut them in half. I don't care.

MR. MINKUS: That's doctoring the pictures, your Honor.

MR. MCWILLIAMS: There's three main areas of trauma, forehead and the two cheeks. That is all I want.

THE COURT: All right, either to cut off the portion from the shoulders on down, or to block it off. One or the other.

MR. MCWILLIAMS: It makes no difference to me.

THE COURT: Do you have a pair of scissors down there?

MR. MCWILLIAMS: I'll see.

THE CLERK: I'll see.

THE COURT: One of the left, one of the right and one full face. The others, no.

Will you cut off the rest of the picture?

MR. MCWILLIAMS: Cut off the black and white. It makes no difference to me. The color shows the black and blue mark in the center of the forehead.

THE COURT: As long as you are putting in color, put them all in color. The black and white is highly deceptive, because you can't tell which is mercurochrome and which is bruise.

MR. MCWILLIAMS: Do you want to cut off right underneath the belly button?

THE COURT: No, the shoulders. Just the head.

All right. Noting defense's objections.

This portion of State's Exhibit 1-C for Identification——

THE CLERK: Part of 1-B. They were part of 1-B.

THE COURT: Part of 1-B for Identification becomes State's Exhibit 2.

(Thereupon, a portion of State's Exhibit 1-B for Identification was marked State's Exhibit 2.)

MR. MCWILLIAMS: I also would ask your Honor, for purposes of this trial, testimony taken at the preliminary hearing woud be submitted; Suzanne McClain, that it was sworn to and subscribed to by the court reporter.

MR. MINKUS: I object, your Honor.

MR. MCWILLIAMS: Let me finish.

I have law for that and I'd just as soon do that tomorrow.

She's unavailable and I have Mr. Martin coming down to testify that she's no longer here.

We have the precedence whereby you can admit the testimony taken in the presence of the defendant where he was represented before a committing magistrate.

THE COURT: We'll cross that bridge when we come to it.
I am not going to enter a ruling on that now.
Let's just keep on going as long as we can.
MR. MINKUS: Can we take a little short recess when this witness is done?
THE COURT: I really don't want to. 10 minutes, but no more.
MR. MCWILLIAMS: All right.
Do you want to do it now, while the jury is out?
MR. MINKUS: Might as well. It will save them running back and forth like they are on a yo-yo.
MR. MCWILLIAMS: Okay.
THE COURT: All right. 10-minute recess.

(Thereupon, a short recess was taken, after which the following proceedings were had.)

THE COURT: Okay. Bring the jury in.

(Thereupon, at 6:35 o'clock p.m., the jury returned to the courtroom.)

THE COURT: State and defense concede the presence of the jury, note the presence of the defendant and counsel in the courtroom and waive polling?
MR. MCWILLIAMS: Yes, your Honor.
All right. I want to admit these into evidence.
These photos have been admitted into evidence.
THE COURT: State's Exhibit 1-B for Identification introduced into evidence as State's Exhibit 2.
THE CLERK: A portion of State's Exhibit 2.
THE COURT: A portion of State's Exhibit 2.
MR. MCWILLIAMS: If I could at this time pass them to the jury.
THE COURT: All right.
Let's proceed. Next question of the witness.

Q. (By MR. MCWILLIAMS) All these matters that you testified to occurred in Dade County, Florida?
A. They did.

MR. MCWILLIAMS: You may inquire, counsel.
MR. MINKUS: No questions.
THE COURT: All right.
Who do you want him to send in?
MR. MCWILLIAMS: Caroline Kelly.

THE COURT: Caroline Kelly, ask her to come in, would you mind, Sergeant?
All right.
You have been previously sworn, haven't you, ma'am?
MRS. KELLY: Right.
THE COURT: Okay. Go ahead.

Thereupon——

CAROLINE KELLY

was recalled as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By MR. MCWILLIAMS:

Q. Ma'am, how long did you know——

THE COURT: Terry, for the benefit of the record, let's have her state her name.

Q. (By MR. MCWILLIAMS) State your name.
A. Caroline Ann Kelly.
Q. How long prior to this had you known Gary Maness and Misty Maness?
A. I had not known them previously. We had merely said hello in passing their apartment on the way to ours.
Q. Prior to April 14, did you ever have occasion to witness any unusual acts between the defendant, Gary Maness, and the victim, Misty Maness?
A. At one time I heard the child in the car crying.
Q. Did you ever have occasion to witness the incident——
A. —I heard the child crying and then I looked out my doorway. The child was throwing a temper tantrum in the rear seat of a white automobile.
Q. Who was with the child?
A. The defendant was with the child. He told the child to, "Shut up. Shut up."
He grabbed the child by the arm and forcibly took the child over to the side of the car.
Q. When you say "took the child forcibly," would you describe——

MR. MINKUS: I object. She has described it.

Q. (By Mr. McWilliams) Tell them as——

The Court: Overruled.

Q. (By Mr. McWilliams) Tell them as best you can——
A. He grabbed the child by the left arm and jerked her to the back seat.
Q. Approximately what amount of force did you see him use? How hard did he jerk her?
A. It was a firm jerk, a hard jerk.
Q. Approximately how long prior to April 14th did he jerk the baby's left arm?
A. It was a matter of two or three weeks.
Q. Did this occur in Dade County, Florida?
A. Correct.
Q. Did he say anything? Did Gary Maness say anything as he jerked the baby's arm?
A. He had just been telling the child to "Shut up."

Mr. McWilliams: You may inquire.

Cross Examination

By Mr. Minkus:

Q. You are sure that was two or three weeks, is that correct?
A. Pardon?
Q. You are sure that's two or three weeks, is that correct?
A. I don't know the exact date, but it was at least two or three weeks.

Mr. Minkus: No other questions.
Mr. McWilliams: May this witness be excused, your Honor?
The Court: Any objections, counsel?
Mr. Minkus: No.
The Court: All right.
Who do you want her to send in?
Mr McWilliams: Marshall Frank, Sgt. Frank.
The Court: All right.
Ma'am, would you ask Sgt. Frank to come in.
You may be excused, if you desire.
The Clerk: Raise your right hand, please.

(Thereupon, the witness was sworn.)
Thereupon——

Marshall Frank

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McWilliams:

Q. Would you please tell the jury your name.
A. Sgt. Marshall Frank, Dade County Public Safety Department, Homicide Section.
Q. How long have you been so employed with the Public Safety Department?
A. 11 years.
Q. How long have you been with the Homicide Squad?
A. Five years.
Q. Okay.
During the course of your duties, did you have occasion to arrest one Gary Maness?
A. Yes, sir, I did.
Q. Do you see him in the courtroom?
A. The gentleman in the Army uniform.

Mr. McWilliams: Indicating the defendant, for the record.

Q. (By Mr. McWilliams) Would you tell the jury the approximate date?
A. I arrested Gary Maness on the 26th of April, 1971, at 2:20 p.m.
Q. Where did you bring him?
A. To my office, to begin with.
Q. Where is your office located?
A. Across from this building, 1320 Northwest 14th Street.
Q. All right.
Now, while you were in the process of booking or whatever it is you do when you arrest prisoners, did the defendant have an occasion to make any statement to you?
A. Yes, sir.
As I was sitting down and I was writing out some paperwork in regards to the arrest, he made a comment to me after he was sitting quietly for a while.
He looked at me and said, "Sgt. Frank?"

I said, "What?"

He said, "What would be the consequences if I gave you a confession?"

Q. What did you tell him?

A. I told him that he was charged with second degree murder and that he could receive anywhere from 20 years to a life sentence.

Q. This was before the preliminary hearing when he was still charged with second degree murder, is that correct?

A. That's right.

Q. Did you have occasion at that time when he made that statement to warn him of his Constitutional rights?

A. I warned him right then.

Q. Would you tell the jury how you did that.

A. Actually, he was warned on three different occasions, all within about a 10-minute period of time.

MR. MCWILLIAMS: Please mark this State's Exhibit 1-D for Identification.

THE CLERK: 1-D.

(Thereupon, the document referred to was marked State's Exhibit 1-D for Identification.)

MR. MCWILLIAMS: And 1-E for Identification.

(Thereupon, the document referred to was marked State's Exhibit 1-E for Identification.)

A. (Continuing) I first warned him verbally.

Q. (By MR. MCWILLIAMS) Now, when he said this to you, about what would happen if he made a confession, was it in response to any question you had asked him?

A. No, sir.

Q. Tell the jury how you went about advising the defendant of his rights.

A. Like I told you, I advised him of the consequences of the penalty for this particular charge if he were convicted.

I then told him before he made any confessions, he would again have to be told his rights; and that he had a right to remain silent; that he didn't have to talk to me if he didn't want to.

I told him if he did answer any questions or did make a confession that it could and would be held against him in a court of law on a future date.

Q. Excuse me, but do you have a piece of paper that you used to read to the defendant his rights?

A. I used that piece of paper the next time, when the court reporter was present, but this is the first time I told him his rights on this date was verbally.

Q. How long after——

A. Five minutes later, I showed him a piece of paper.

Q. Did you basically ask him the same questions on the piece of paper as you did verbally?

MR. MINKUS: Objection.

THE COURT: Read that back.

(Thereupon, the question was read by the reporter.)

THE COURT: And your objection?

MR. MINKUS: He is leading the witness.

THE COURT: Overruled.

Q. (By MR. MCWILLIAMS) Let me show you what's been marked 1-D for Identification, a piece of paper, and ask you if you can identify that.

A. Yes, sir, I can.

Q. Where have you seen that piece of paper before?

A. I presented this piece of paper to Mr. Maness on this date after I had a short conference with him.

Q. Whose signature is at the bottom of that?

A. My signature and the signature of Sgt. Gary Minium, and the signature of the defendant.

Q. All right.

Did you use this piece of paper to warn the defendant of his Constitutional rights?

A. Yes, sir, I did.

Q. Is this in the same condition now as—— Did the defendant sign it in your presence?

A. Yes, sir, he did.

Q. Is it in the same condition now as when the defendant signed it?

A. Yes, sir.

Q. Where has it been since the defendant signed it?

A. In my custody.

Q. When did he sign it?

A. He signed it on the 26th of April, 1971, at 4:00 p.m.

Q. Now, would you read to the jury the questions and answers and indicate to the jury the responses Gary Maness, as you advised him?

A. It begins:

"Before you are asked any questions, you must understand your rights.

"1. You have a right to remain silent. You need not talk to me or answer any questions if you do not wish to do so."

And I asked him if he understood. He said he did.

"2. Should you talk to me, anything which you say can and will be introduced into evidence in court against you."

I asked him if he understood, and he said he did.

"If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel."

I asked him if he understood that. He said he did.

I told him:

"4. If you cannot afford an attorney and so desire, one will be provided without charge."

I asked him if he understood. He said he did.

I asked him if he'd give me a confession and a statement without the presence of an attorney, and he said he would.

Then, at the bottom it says:

"I have read the above statement of my rights and am fully aware of the said rights."

Then it says:

"I am willing to answer any questions asked of me."

Then it says:

"I do not desire the presence of an attorney at this time."

And then, finally, it says:

"This statement is signed of my own free will without any threats or promises having been made to me."

Q. All right.

Did he then sign it?

A. Yes, sir.

Q. Did you make any threats or promises to Gary Maness?

A. No, sir.

Q. Did you in any way use any type of coercion at all?

A. No, sir.

MR. MCWILLIAMS: We would move to introduce this Constitutional rights warning form, 1-D for Identification, into evidence, subject to cross-examination, of course.

MR. MINKUS: No objection.

THE COURT: Introduced.

State's Exhibit 1-D for Identification becomes State's Exhibit 3.

(Thereupon, State's Exhibit 1-D for Identification was marked State's Exhibit 3.)

Q. (By MR. MCWILLIAMS) After he signed that rights warning form, did you, in fact, take a statement?

A. Yes, sir, I did.

Q. Did you have a court reporter present while you took that statement?

A. Yes, sir.

Q. Did you have that statement notarized?

A. Yes, sir.

Q. Let me show you what has been marked 1-E for Identification, and ask you if you can identify that.

A. Yes, sir. This is a transcript of the statement I took from him on that date.

Q. After you had the transcript made, did you have occasion to see Gary Maness to check it for accuracy?

A. Yes, sir. He checked it for accuracy and made one or two corrections and then signed it.

Q. Are those corrections in his own handwriting?

A. Yes, sir. He initialed it.

Q. Did he do that in your presence?

A. Yes, sir.

Q. When did you take the statement or the confession? What date?

A. That same date, the 26th of April at 4:30 p.m.

Q. What time did you bring it to him typed up for him to make any corrections?

A. Approximately an hour later.

Q. Did he initial each and every page of that?

A. Yes, sir, at the bottom.

Q. Have you looked at that 1-D for Identification and does it truly and accurately represent the questions you asked and the answers he gave on that date?

A. Yes, sir.

Q. Would you read it to the jury, from the beginning?

Read the questions you asked and the answers he gave, from the very beginning to the very end.

A. All right.

"Q. (By SGT. FRANK)——"

Q. That's you, isn't it?

A. Yes, sir. I am quoting the entire statement.

"Q. Would you please tell me your full name and age.

"A. Gary Randall Maness, twenty-one."

Q. Would you indicate the question?

A. Fine.

"Q. Home address and phone number?

"A. 649 Southwest 1st Avenue, Homestead, Florida. I don't know what the phone number is.

"Q. Is it 248-3794?

"A. Right.

"Q. Where are you employed and in what capacity?

"A. U.S. Army Missile Crew, Everglades National Park.

"Q. Is your base at the Homestead Air Force Base?

"A. I'm based at Everglades National Park, assigned from Homestead Air Force Base.

"Q. Where do you make your home?

"A. Original home?

"Q. Yes.

"A. Tennessee, Lexington, Tennessee.

"Q. What is your parents' address?

"A. I don't know. They live in St. Louis. I think it's 2804 A Victor Street, St. Louis, I'm not sure.

"Q. Gary, before we go any further I would like to show you this form and ask you if you recognize it (indicating)."

This is indicating the Constitutional rights warning form.

"A. Yes, sir.

"Q. And is that your signature at the bottom?

"A. Yes.

"Q. Did you read this form titled Constitutional Rights Warning Interrogation, and fully understand everything on it?

"A. Yes, sir.

"Q. What grade did you go in school?

"A. Twelfth.

"Q. Did you sign this form freely and voluntarily?

"A. Yes.

"Q. I would like to again read you the Constitutional rights from this form to verify that you understand everything.

"Before you are asked any questions, you must understand your rights.

"You have the right to remain silent. You need not talk to me or answer any questions if you do not wish to do so. Do you understand?

"A. Yes.

"Q. Should you talk to me, anything which you say can and will be introduced into evidence in court against you. Do you understand?

"A. Yes.

"Q. If you cannot afford an attorney and so desire, one will be provided without charge. Do you understand?

"A. Yes, sir.

"Q. Are you willing to answer these questions without the presence of an attorney?

"A. Yes, sir.

"Q. Are you fully aware of these rights that have been read to you?

"A. Yes.

"Q. And it is a fact that on previous occasions when questioned by myself and Sgt. Norris, you have also been advised of your rights at that time?

"A. Yes.

"Q. Gary, at the present time you are also aware that you are being charged with second degree murder?

"A. Yes, sir.

"Q. And are you aware that the penalty of second degree murder carries 20 years to life?

"A. Yes.

"Q. Gary, it is my understanding at this time that you want to make some corrections regarding the first statement given by you to Sgt. Norris on April 18th; is that correct?

"A. Yes, it is.

"Q. Let me ask this: Was everything in that statement you told Sgt. Norris the absolute truth?

"A. No.

"Q. Do you know what caused the death of your baby, Misty Maness?

"A. Yes, sir.

"Q. What was that?

"A. I think it was a bloodclot on the brain.

"Q. Do you know how she received these injuries that caused her death?

"A. Yes.

"Q. Would you tell me about that?

"A. The day I took her to the hospital, on Wednesday the 14th, my wife went to the store that afternoon for a few minutes and the baby was crying. I went back to the bed-

room to give her the bottle and take care of her, and I rocked her for a while.

"Q. Was she crying?

"A. Yes.

"Q. Go ahead.

"A. I put her back in her bed, rocked her bed, and I guess I just lost my cool, like you said, and I slapped her twice.

"Q. Where did you slap her?

"A. In the jaw.

"Q. How hard did you slap her in the jaw?

"A. What do you mean, how hard; like I knocked her silly or what do you mean?

"Q. How did the baby react after these few times?

"A. She sniffed a little bit, took her bottle and laid on her side. I put the blanket back over her and waited for my wife to come back.

"Q. About what time was that on Wednesday?

"A. A little after 4, I guess.

"Q. How long after that did your wife get home?

"A. Just a few minutes.

"Q. And how long after that did you or your wife check on the baby?

"A. I guess about a half hour later my wife went to get her and feed her.

"Q. And what happened then?

"A. My wife called me in there, and she was pale and real limp and she had two bruises on her cheek, so we called the girl upstairs to come down and she looked at her and said it would be a good idea if we took her over to Homestead Air Force Base.

"Q. Was that Mrs. Kelly?

"A. Yes, sir.

"Q. What did you tell Mrs. Kelly in response to that?

"A. I told her I would call Buddy at the Battery and have him come in and take her over. So I called Buddy at the Battery and he said he would be in as soon as he could. And he didn't come, so we went and got Mrs. Kelly and she took us over.

"Q. How long was your wife gone that afternoon leaving you alone with the baby?

"A. About four or five minutes, just to the store and back.

"Q. After you struck the baby these two times in the jaw, did the baby remain quiet from then on?

"A. You couldn't hear her anyway, the bedroom door was closed and the TV was on.

"Q. Did you strike her with the open hand or the fist?

"A. Open hand.

"Q. In what manner, a forward stroke and backhand, or two forward strokes?

"A. Two forward strokes.

"Q. Was the baby laying down or sitting up at that time?

"A. Laying down. I think it was a forward stroke and a back stroke.

"Q. A backhand after the first?

"A. Yes.

"Q. Prior to this time, were there other occasions which the baby upset you by its crying?

"A. I guess so.

"Q. How upset would you get with the baby?

"A. You mean when I hit her again, like that?

"Q. How many times have you struck the baby in the face?

"A. Never. I smacked her jaw once, I think. There was an occasion when I did smack her jaw once before, but I didn't hit her hard.

"Q. Do you know how the child broke its left arm?

"A. No, sir. I've been told how everybody thinks it broke its left arm.

"Q. Was there ever an occasion in which you roughly transferred the baby from one side of the car to the other?

"A. I had her arm once and slid her across the seat; is that what you mean?

"Q. Yes. If that is what you did.

"A. I didn't jerk her across.

"Q. Which arm did you bring her across the seat with?

"A. I believe it was the right arm.

"Q. Your baby had a broken leg. Do you know how that happened?

"A. No, sir.

"Q. Did you ever have occasion to strike her legs?

"A. I smacked her legs once in the car.

"Q. How many times did you smack her legs?

"A. I believe two.

"Q. Which leg did you smack?

"A. I don't know.

"Q. Did you smack her legs hard?

"A. I guess it would be the right leg.

"Q. Do you recall the first two times that Misty Maness, your child, was brought to the Homestead Air Force Base Hospital with bruises?

"A. Yes, sir.

"Q. Can you tell me how those bruises were afflicted?

"A. That hapened like we said, she bumped her head on her bed.

"Q. Going back, Gary, when did you first meet your wife, Linda, approximately?

"A. Right after I come back from Nom, August of '69, I believe.

"Q. When did you marry her?

"A. December, '69. I believe it was December, '69.

"Q. Did you marry her for any other reason besides love?

"A. She was pregnant.

"Q. Pregnant by you?

"A. Yes, sir.

"Q. And after your marriage to her, was there an occasion when you and your wife were separated?

"A. Yes, sir.

"Q. How long a period was that?

"A. Before I went down before the baby was born?

"Q. Yes.

"A. It would be about seven or eight months.

"Q. And did you return to El Paso to stay with your wife again in the summer of last year?

"A. Yes, I did.

"Q. And were you present when the baby was born?

"A. Yes, sir.

"Q. Was there ever occasions between then and now that you had discussed divorce with your wife or with anybody else?

"A. Yes, sir.

"Q. Often?

"A. Not very often, no.

"Q. Have you ever seriously considered divorce?

"A. I did once.

"Q. When did you come to Homestead, approximately?

"A. It was in February of '70.

"Q. That was the first time, right?

"A. Yes.

"Q. When did you come back to Homestead the next time?

"A. (No response.)

"Q. Let's put it this way: How long have you lived in Homestead currently?

"A. About a year and a half.

"Q. But you were away from Homestead for a while; correct?

"A. Two months.

"Q. Then when did you finally return to Homestead and have stayed here?

"A. What is that?

"Q. How old was your baby when you left El Paso?

"A. She was, I guess, about a month old.

"Q. Did your wife stay in El Paso while you came here?

"A. Yes, sir.

"Q. When did your wife come to stay with you in Homestead?

"A. March 12th.

"Q. And since March 12th until now, or until the death of your child, have you ever seen Linda abuse the child physically in any way?

"A. Never, just spank her.

"Q. Spanked her how?

"A. On the butt.

"Q. Roughly?

"A. No.

"Q. Did she ever attempt to stop you from striking the child?

"A. No. She said something once, but physically like that, no.

"Q. What did she say once?

"A. She said she didn't think I should spank the baby.

"Q. Did she comment on how hard you were spanking the baby?

"A. I don't remember.

"Q. Was there ever a time when you sent your wife out of the room when you were spanking the baby?

"A. Yes.

"Q. How many times did that occur?

"A. Three or four, I guess.

"Q. Why would you send Linda out of the room?

"A. Because the baby would look at her, and as long as she could see Linda, she wouldn't go to sleep.

"Q. And were you spanking the baby at these times?

"A. I spanked her once or twice.
"Q. Where did you spank her on these occasions?
"A. On the butt.
"Q. Have you ever had a problem with your temper?
"A. You mean do I lose it a lot?
"Q. Yes.
"A. I holler a lot, nothing physical.
"Q. Have you ever had occasion to lose your temper at the baby and holler at it?
"A. Yes, sir.
"Q. What would you holler to the baby?
"A. I would holler and tell her to be quiet or to lay down.
"Q. Is there some reason why you began resenting the baby after Linda came here to Homestead to meet you?
"A. No, sir.
"Q. Did the baby ever show you resentment?
"A. It would cry once in a while when I picked it up.
"Q. Did that bother you?
"A. Not really, no.
"Q. Since the beginning of this investigation, has any police officer or anyone else mistreated you?
"A. No, sir.
"Q. Has anybody threatened or coerced you at any time in order to make you give a statement?
"A. No.
"Q. Have you given this statement knowing full well all of your Constitutional rights to an attorney before?
"A. Yes, sir.
"Q. And have you given this statement freely and voluntarily of your own free will?
"A. Yes, sir.
"Q. Is there anything more you want to say?
"A. No, sir.
"(Thereupon, the statement was concluded.)"

Q. Was that then sworn to and certified by a Notary Public?
A. Yes, sir.
Q. By the defendant?
A. Yes, sir.
Q. Did he swear to the truth of the facts contained in it?
A. Yes, sir.

Mr. McWilliams: State would move to introduce the transcribed confession.

Mr. Minkus: I object.
The Court: What?
Mr. Minkus: I object, based on the fact that I think it's not voluntary.
The Court: Same ruling.

State's Exhibit 1-E for Identification introduced into evidence as State's Exhibit 4.

(Thereupon, State's Exhibit 1-E for Identification was marked as State's Exhibit 4.)

Q. (By Mr. McWilliams) Did all these matters that you testified to occur in Dade County, Florida?
A. Yes, sir.

Mr. McWilliams: You may inquire.

Cross Examination

By Mr. Minkus:

Q. Sgt. Frank, calling your attention to April 25, 1967, did you have occasion to see Gary R. Maness?
A. April 25, 1967?
Q. I mean 1971. Excuse me.
A. Yes.
Q. Where did you see him?
A. On April 25th, which was a Sunday evening, I saw him first at his home and then at the Homestead Police Department.
Q. Tell me what happened at his home, what you said to him and what he said to you at that particular time.
A. Actually, I first went to his home about 7:00 p.m. that night.
I advised them both I wanted to interview them and I interviewed Linda Maness first. She agreed to come to a different location to be interviewed in private.
And then, when I concluded with her, I returned her home and asked Gary Maness if he would also do the same. And he did.
I didn't ask him any questions at his home at all.
Q. So, what did you do then?
A. I took him to the Homestead Police Station.
En route, I advised him of his Constitutional rights.
Q. What did you say to him en route?

A. I told him—— First, I asked him if he recalled being advised of his rights by Sgt. Norris in a statement previous. He said he did.

I said—— I also advised him, incidentally, his wife.

So, at this particular time I said I wanted to advise him again. I told him that he had a right to remain silent; that he need not talk to me if he didn't want to do so, if he didn't want to do so; if he did say anything that was incriminating against him, that I could and would hold it against him in a court of law.

I told him that he still had a right to an attorney at any time then or thereafter, and that if he couldn't afford one the State would provide him with one.

He said that he would answer any questions that I had. He didn't need an attorney.

Q. What happened then?

A. I took him to the Homestead Police Station. We sat down and I asked him some basic questions regarding——

Q. Who was present at that particular time?

A. Sgt. Duckworth.

Q. What was stated at that particular time between——

A. Sir? I didn't hear you.

Q. What was stated at that particular time between all three of you?

A. What was stated?

Q. Yes. What did you say to him, or Sgt. Duckworth, and what did he say to you?

A. I can only give you, sir, a basic conversation. I can't remember verbatim the entire conversation that took place. All right?

Q. Yes. Tell me what occurred.

A. I asked him some basic questions regarding his history with his wife.

Q. What did you ask him?

A. I asked him: "How long have you been married?"

I believe I asked him where he got married. And then I asked him if his wife was pregnant when he married her.

He said, "Yes."

I asked him what date it was his wife returned to the Miami area.

I asked him——

Q. What did he say?

A. March 12th.

I then asked him—I really don't recall the order in which I asked the questions, sir. All right?

All I can tell you is the general gist of the conversation that took place, which was approximately 45 minutes or an hour.

Q. Well, tell me the general gist of the conversation from question to question and statement to statement, as best as you can recollect.

A. I asked him if he had had any resentment for the child.

He said, "No."

I asked him if the child had ever been abused, to his knowledge, before she returned back to the Homestead area.

He said not to his knowledge.

I also asked him during the time they were living together in Homestead, which was from March 12th up until the time I interviewed him, had anybody else ever baby-sat for the child.

He said, "No."

I asked him how the child received these injuries. He told me his child had a habit of beating its head with a baby bottle as it was holding the nipple. He told me that the child had a habit of beating its own head against the crib and that it sustained bruises from this once before.

He told me that the child had the bruise mark on its chest from sleeping on the bottle, on its stomach.

And I asked him if he had ever beaten the child.

He said he did not. This was on the night of the 25th.

I asked him if his wife ever beat the child, to his knowledge.

He said, "No."

I didn't take a formal statement at that time. I can't——

Q. That was the text of a 45-minute conversation?

A. As best as I can relate it, at the moment.

Q. Didn't you say: "Gary, did you kill the baby?"

A. Yes, I might have said that.

Q. What did he reply?

A. He said, "No."

Q. Then, didn't you say: "Yes, you did, and I know how"?

A. I know I told him—I said words to the effect——

Q. Did you say, "Yes, you did. I know how"?

MR. MCWILLIAMS: Objection.

THE COURT: Let him answer.

Go ahead, Sergeant. Answer the question.

A. (Continuing) No, sir.

Q. (By Mr. Minkus) Did you then say——

The Court: Counselor, he was answering a question and the State objected.

Permit him to answer the question.

A. (Continuing) I did tell him—I did ask him if he knew how the baby died. I told him then——

Q. (By Mr. Minkus) What did you say to him?

A. I told him that the baby died from a subdural hemorrhage. I told him also that the child had a broken arm and a broken leg, and asked him if he knew how these injuries were sustained.

He said, "No."

Q. Didn't you say, also, that: "You went to the grocery store—your wife went to the grocery store and the baby was crying and you lost your cool and hit the baby two or three times," at that particular occasion?

A. No, sir. That isn't exactly what I said.

Now that you refresh my memory, I asked him a question that was related to me by his wife, earlier that night. I asked him if it were true that earlier that day, late in the morning, as they were walking down the street, as he was carrying his baby, isn't it true that his baby was crying and that he got upset and that he smacked it. He says, "That didn't happen."

Q. Would you repeat that?

A. He says, "That didn't happen."

Q. Then, isn't it true you got right next to him, right in front of his face, and you started speaking to him so that the saliva was falling out of your mouth and onto his face and you said, "You son of a bitch. You don't know how much I would like to jump you. I would like you to jump so I could beat the shit out of you. It makes me sick to be around you." Did you say that?

A. No, sir.

Q. Then, didn't you say: "You son of a bitch. So why don't you hit me?"

A. No, sir.

Q. Then, didn't you turn to your partner who was in the room at that time and say: "You talk to him. He makes me sick."

A. Yes, sir. That's true. As I was walking out the door to go out to the lobby of the police station for a few minutes to get a Coca-Cola or something, I did whisper to Sgt. Duckworth, I believe it was just that remark. I wasn't aware that Mr. Maness overheard it.

Q. And then, at that time, didn't your partner say to him: "Do you go to the store at night?"

A. Did my partner say that to him?

Q. Yes.

A. I don't recall.

Q. And didn't Gary Maness reply, "Sometimes. Why?"

A. I don't recall.

Q. And then, didn't your partner say: "Be careful. You know what I mean."

Didn't Gary Maness at that time reply, "Yes"?

A. I don't recall that.

Q. Then, you asked him this question. Did you ask him this question: "Do you love your wife?"

A. Yes, sir, I did ask him that on a couple of occasions.

Q. What was his response?

A. "Yes," that he said.

Q. Then, didn't you make this statement: "Then, tell the truth and get her out of trouble. You don't want her to go to jail, do you?"

A. I did not say that.

Q. Didn't he then reply, "No"?

A. No, sir, I didn't ask that question.

Q. Then, didn't your partner say to him: "Let's take him home. He is not going to talk"?

A. I don't recall that. He may have.

Q. Then, didn't your partner say: "Shall we drive him home"?

And the defendant replied, "I can walk"?

A. That could be, but I don't recall.

Q. Then, didn't your partner say, "No, we better take you. Someone might run you over before you get there and I wouldn't want to make out the paperwork on someone like you"?

A. I don't recall that, either.

Q. Then, didn't you leave the police station with Gary Maness in your car, with your partner, and you drove him home?

Then, didn't you say to him: "Gary, I want you to think over what I told you about your wife"?

A. I don't recall saying that.

Q. Well, you were there, weren't you?

A. I just don't recall saying that.

Q. Okay.

And then, you told him, "Don't leave town"? Is that true?

A. I said words to that effect: "I'd appreciate it if you wouldn't leave town, because we want to talk to you."

Q. And then, didn't he reply: "I will not leave town"?

A. Words to that effect. I don't recall.

Q. All right.

Now, when was the next time you saw Gary Maness?

A. The following day at 2:20 p.m., at his house.

Q. All right. What happened?

A. I had a warrant and I placed him under arrest for second degree murder.

Q. Did you put him in the car at that particular time?

A. Yes, I did.

Q. At that particular time, did you advise him of his Constitutional rights?

A. No, sir.

Q. You didn't advise him in the automobile, you said to him, "You have been informed previously and advised of your Constitutional rights"?

A. Right. At that time I didn't tell him anything except that he was under arrest.

Q. While you were driving down to the jail, didn't you have a conversation with your partner?

A. I may have. It's a long drive. I imagine I didn't stay mute the whole time. I really don't know what I said or what he said.

Q. Didn't you say to your partner: "Boy, will he get fucked when he gets in jail" and then laugh?

A. No, sir, I didn't say that.

Q. Then, when you were coming close to the jail, didn't you say to him: "Have you thought about what I told you"?

A. I don't recall. I don't recall any conversation in particular at that particular time.

Q. Then, on the way to the jail, didn't you talk about an auto wreck you saw at that particular time, one you saw on the way?

A. I don't recall seeing an auto wreck on the way.

Q. Okay.

Then, you went into the jail, is that correct?

A. No, I went up to my office.

Q. Did you take Gary Maness to your office?

A. Yes, I did.

Q. Did you put him in your office?

A. You might say that, yes, sir.

Q. All right.

At that time, you had another conversation with him, didn't you?

A. The conversation that I related to the Court.

Q. You had a conversation with him, is that correct?

A. That's right.

Q. Didn't you say to him: "Why did you do it"?

A. I don't recall those particular words.

Q. And he replied: "Do what"?

MR. MCWILLIAMS: Objection to the form of that question.

THE COURT: Sustained.

He said he doesn't recall.

Ask him the next question.

Q. (By Mr. Minkus) And then you said: "Kill your baby."

MR. MCWILLIAMS: Objection. He's not asking a question. He's reading off some piece of paper.

MR. MINKUS: Yes, this was the conversation. I am laying grounds for impeachment.

MR. MCWILLIAMS: Objection. He is not asking a question properly and I object to it.

Q. (By Mr. Minkus) Did you not say to Gary Maness at that time, "Did you kill your baby"?

A. Not those words, no, sir.

Q. And didn't you further ask him: "Let me ask you something else. You know I hate to see your wife go to jail, don't you"?

A. No, sir, I didn't ask him that.

Q. And then you said, "Dade County Jail is no place for a girl. They treat them like shit there. Is that what you want"?

A. I did not say that.

Q. And then, didn't you say: "You can help her by saying you did it, and that she had nothing to do with it"?

A. No, sir.
Q. At that time, did he ask for a lawyer?
A. No, sir, he didn't.
Q. And then, didn't you make the statement to him: "Yes, you can, but if you do I won't talk to you again"?
A. I don't recall that at all.
Q. And then, didn't he say: "I will make a statement"?
A. That's not the way it happened, counselor.
Q. And then, didn't he ask you if he could call his wife first?
A. After he asked me—
Q. Did he ask you to call his wife?
A. After he asked me what the consequences were of the confession, I advised him of his rights. And then, he asked me if he could call his wife.
Q. All right.
Did he call his wife at that particular time?
A. Yes, he did. I assume he did.
Q. Well, didn't you dial the number?
A. I don't recall dialing the number.
Q. Well, you took a statement from him in which you asked him: "What's your home address and telephone number?" And you told him what his telephone number was.
A. There's a good possibility I dialed his number for him. I don't recall.
Q. Did you overhear the conversation that he had then with his wife?
A. No, sir, I didn't.
Q. Did you overhear him say to his wife—

Mr. McWilliams: Objection.

The Court: Sustained. He said he didn't hear the conversation.

Q. (By Mr. Minkus) And then, didn't you talk to the mother-in-law of the defendant, who was at the home at that particular time when he got through on the phone?
A. Did I talk to her then?
Q. Yes, when he got through speaking.
A. She wasn't there. You mean, did I talk to her on the phone?
Q. Yes.
A. I don't recall talking to her on the phone. I may have, but I just didn't make note of it.

Q. Okay.
When you were taking this statement from him, you asked him a question for him to tell you what was happening and he was giving you a narrative and you said to him:
"Q. Go ahead."
And did he not reply:
"A. I put her back in her bed, rocked her bed, and I guess I just lost my cool, like you said, and I slapped her twice."
A. What page are you on, counselor?
Q. It's on page 4.
A. That was his answer to me, that's correct.
Q. "Like you said," like you told him?
A. Those were his words, yes, sir.
Q. When did you tell him he did it that way?
A. I never used that phrase, "lost your cool." I never used that particular terminology.
Q. Well, did you ever tell him that he slapped his baby twice?
A. I didn't tell him he did, no, sir. He told me he did.

Mr. Minkus: I have no other questions.

Redirect Examination

By Mr. McWilliams:

Q. How long have you been with the police department, Sergeant?
A. 11 years.
Q. Would you tell the jury why you had a stenographer there then, like this young lady over here, present during the statement?
A. So that every question and every answer could be recorded and reviewed at a future time with accuracy.

Mr. McWilliams: I have no further questions.

Recross Examination

By Mr. Minkus:

Q. Was there a stenographer present with you on the evening prior to his giving you the statement?
A. No, sir, there wasn't.
Q. So that particular conversation wasn't reduced to writing, is that correct?

A. That's right.

MR. MINKUS: I have no further questions.

Wait one second.

MR. MCWILLIAMS: I have nothing further, your Honor.

And at this particular point, could I ask that the jury be excused?

THE COURT: All right.

Ladies and gentlemen, step into the jury room for a few moments.

(Thereupon, at 7:20 o'clock p.m., the jury retired to the jury room.)

THE COURT: Why?

MR. MCWILLIAMS: Judge, at this time the State would move to have the transcript—I would rather do it in the morning, because Roy Martin will be here to lay the predicate as to the unavailability of the witness Suzanne McClain. You have already heard testimony that she is in Ohio.

Could you please extract the subpoena?

THE COURT: I heard it.

MR. MINKUS: I have no chance to cross-examine.

MR. MCWILLIAMS: She was—

MR. MINKUS: I wasn't there. That was for a preliminary hearing, that wasn't where the man was on trial for his life or for manslaughter.

THE COURT: No, it was for second degree murder.

MR. MINKUS: Yes. That was a preliminary hearing.

THE COURT: This is Carl Sturge that I have. This isn't what you want me to read, is it?

What page?

MR. MCWILLIAMS: Suzanne McClain.

MR. TUNKEY: Right in the front it gives the page number for each witness.

MR. MCWILLIAMS: If you'd look at the subpoena, too, Judge, it indicates: "Moved. No service." There's no forwarding address.

Judge, Mr. Tunkey has gone up to get the Florida Jur. I have got the page all marked. I didn't expect we'd get this far this night. He will be right down.

MR. MINKUS: Your Honor, let me say this, since Mr. McWilliams, the prosecutor, wants this introduced tomorrow anyway, I'd like a chance to research this tonight

because this really doesn't give me an opportunity to cross-examine this woman at all by entering this into evidence, obviously.

MR. MCWILLIAMS: We would enter the direct examination and cross examination of the witness.

MR. MINKUS: Yes, but it was for different purposes that that hearing was held, other than the fact that the defendant was on trial for manslaughter.

MR. MCWILLIAMS: As long as Mr. Tunkey went to get the law, your Honor, it applies specifically to testimony taken at a preliminary hearing.

MR. MINKUS: Well, your Honor, would you allow me to argue that point tomorrow?

The Court sent over a court-appointed attorney in the afternoon who was rather unfamiliar with the case as I understand it from the defendant, my client.

At that particular time, I myself couldn't go forward on the proper cross examination.

THE COURT: I am familiar on the subject as far as the admission of testimony which has been preserved in this manner where they are represented by counsel. There's some parts of it that concern me.

MR. MCWILLIAMS: Your Honor, we can rule on the admissibility of certain statements. If they would not be admissible during this trial, you can strike them.

THE COURT: Let's defer ruling on this entire matter and go to the next witness.

MR. MCWILLIAMS: There won't be one.

THE COURT: What's that?

MR. MCWILLIAMS: That's why I saved it until the end, Judge. I expected to do it in the morning.

THE COURT: All right. Read it to me or hand it to me, one or the other.

MR. MCWILLIAMS: If I can read it so the record——

THE COURT: How long is it? I'd rather cite it if it's too long.

MR. MCWILLIAMS: This is Florida Jur., Section 283, Evidence in Criminal Case.

"It is conceded that where the testimony of a witness before a committing magistrate or at a coroner's inquest has been reduced to writing as provided by statute, it may be introduced as evidence of what the witness swore to, providing a proper showing is made as to the unavailability of the witness."

And the test is given in Section 281.

"If the evidence was not preserved in the bill of exceptions or incorporated in the record proper, it may be used at a subsequent trial or hearing of a civil case under the following conditions: (1) Where such evidence at the former trial was reported stenographically or reduced to writing in the presence of the court; (2) Where the party against whom the evidence is offered or his privy was a party on the former trial; (3) Where the issue is substantially the same in both cases; (4) Where a substantial reason is shown why the original witness or document is not produced; and (5) Where the court is satisfied that the report of such evidence is a correct report."

MR. TUNKEY: That's it.

MR. MCWILLIAMS: The only other reason why I'd ask that it be ruled on tomorrow morning is Roy Martin made an attempt to find this witness and determined that she no longer works here, no longer lives here. None of the phone numbers or addresses are any good. Nobody has seen or heard from this witness.

I didn't know until the witness testified today that she was in Ohio.

In Alvarez v. State, 75 Fla. 286, basically it says, where the testimony of a witness before a committing magistrate has been reduced to writing, it may be introduced, providing the proper showing is made as to the unavailability of the witness.

MR. MINKUS: May I see that?

MR. MCWILLIAMS: Those portions which would be inadmissible, your Honor can rule on them.

THE COURT: I am going to sustain the defense's objection to the introduction of the transcript.

Let's proceed.

MR. MCWILLIAMS: Your Honor, would you give me until tomorrow morning to lay the proper predicate, as far as the direct testimony is concerned?

THE COURT: No. We are proceeding.

State announcing it is going to rest?

MR. MCWILLIAMS: Yes.

THE COURT: Do you want to make motions now, and then he can rest again in the presence of the jury when they come back?

We are going to proceed for a while longer.

MR. MINKUS: How much longer, your Honor?

THE COURT: Well——

MR. MINKUS: I tell you, I am pretty beat.

THE COURT: Well, you think you are?

I can appreciate it.

We are proceeding a while longer. I understand the problem, counsel. Believe me, I understand the problem.

MR. MINKUS: Let me just say this to you: I myself don't think that I can do a justifiable job for my client under the present circumstances at this time.

THE COURT: It's only 7:30.

MR. MINKUS: I understand. I am very tired. I am just telling you how it is.

THE COURT: Well, I understand that you are very tired. I'd like to proceed for at least another hour and possibly longer.

In fact, I'd like to finish the case, but I don't know, having no idea now of what is coming. It's impossible for me——

MR. MINKUS: Well, your Honor, if your Honor will allow me to take a break for dinner for about half an hour, I would be glad to conclude the trial tonight.

MR. MCWILLIAMS: Why don't we just——

THE COURT: Let's just proceed like I said.

Now, he's announced that he's rested.

Do you want to make a motion now for directed verdict or not?

MR. MINKUS: Yes. I wish to make a motion for a directed verdict.

THE COURT: Do you want to argue it or submit it without argument?

MR. MINKUS: Pardon?

THE COURT: Do you want to argue or submit it without argument?

MR. MINKUS: I submit it without an argument, your Honor.

THE COURT: Motion for a directed verdict of acquittal at the close of the State's case be and the same is hereby denied.

Bring the jury back in.

We'll continue on. I'll try not to be too unreasonable.

MR. MINKUS: Let me say this: If I could take 15 or 20 minutes to refresh myself——

THE COURT: We just had a recess.

MR. MINKUS: Just a refreshment and——

THE COURT: I haven't seen daylight since—you know, we go every day like this.

MR. MINKUS: I agree with you. I don't see how you do it.

THE COURT: We don't know whether it rains or snows out there and none of us would know it until we step out at whatever hour we get out of here.

MR. MINKUS: Your Honor, I want to finish the case tonight. I'd just like to get some refreshment so I can boost myself.

THE COURT: We all do. We are going forward at this point.

I understand the problem.

We just took a recess 20 minutes ago for what I thought was that purpose and other purposes.

(Thereupon, at 7:30 o'clock p.m., the jury returned to the courtroom.)

THE COURT: State and defense concede the presence of the jury, note the presence of the defendant and counsel in the courtroom, waive polling?

MR. MCWILLIAMS: Yes, your Honor.

THE COURT: All right.

MR. MCWILLIAMS: State rests.

THE COURT: All right.

Proceed, counsel. The State has rested its case.

MR. MINKUS: At this time, the defense would like to call Linda Maness to the stand.

THE COURT: Linda Maness.

THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)

Thereupon——

LINDA MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Did you ever tell——

THE COURT: May we have her name and address——

MR. MCWILLIAMS: Objection.

THE COURT: —on the record?

Q. (By MR. MINKUS) What is your name and address, for the record?

A. Mrs. Gary Maness, 225 Harvard Avenue, El Paso, Texas.

MR. MINKUS: At this particular time, Judge, I would like to be able to question the witness as an adversary and hostile witness.

THE COURT: Denied. There's no showing.

Q. (By MR. MINKUS) Did you ever have a conversation——

MR. MCWILLIAMS: Objection.

THE COURT: Sustained.

Q. (By MR. MINKUS) Did you ever tell Mrs. McClain——

MR. MCWILLIAMS: Objection.

THE COURT: Too leading?

MR. MCWILLIAMS: No, Judge. He's trying to impeach a witness he hasn't asked any questions on direct yet. It's an improper predicate.

THE COURT: Well, objection sustained to leading.

I don't know. He has not asked the rest of the question. I don't know whether he's impeaching or not.

Q. (By MR. MINKUS) Did you kill your baby?

A. No, I did not.

Q. Did you ever strike your baby——

A. No, I didn't.

Q. —in the face?

A. No.

Q. And in the head?

A. No.

Q. Isn't it a fact that you know that your husband, Gary Maness——

MR. MCWILLIAMS: Objection.

Q. (By MR. MINKUS) —did not—

MR. MCWILLIAMS: Objection, Judge.
THE COURT: Sustained.
MR. MCWILLIAMS: Counsel, it's your witness.
MR. MINKUS: Yes, she is an adverse, hostile witness.
MR. MCWILLIAMS: Objection to those statements. I move they be stricken. Ask the jury to disregard it.
THE COURT: Objection sustained.
Stricken.
She's your witness. Ask her questions that are not leading.

Q. (By MR. MINKUS) Please tell me what happened on April 14, 1971.
From the moment you got up in the morning, what did you do?
A. From the moment I got up? Okay.
Q. What time did you get up?
A. About 9:30, 10.
Q. Who was present in your house at that time?
A. The baby and myself.
Q. Where was your husband?
A. He was at work.
Q. Did you notice anything unusual about the baby at that particular time?
A. She had a bruise on her forehead.
Q. How did the baby get that bruise on her forehead?
A. I don't know.
Q. Did you ever tell anybody how he got that bruise on his forehead?
A. No.

THE COURT: I think your question, counsel was for her to tell exactly what happened on April 14th.
Have you abandoned that question?
MR. MINKUS: No. I plan to go into that, your Honor.

Q. (By MR. MINKUS) Okay. What happened at 9:30 in the morning? What did you do then?
A. Well, I fed the baby, dressed myself and the baby.
Q. What was the condition of the baby at that particular time?
A. She was fine, healthy.

Q. Well, you stated there was a bruise on her forehead. Was there a bruise on her forehead?
A. Yes.
Q. How was her arm, her left arm?
A. Well, she babied it a little bit.
Q. How was her leg, her right leg?
A. Well, she crawled around on it.
Q. What happened after you fed the baby?
A. Well, I put her down to play for a while. And then, Gary came home.
Q. What time did your husband get home?
A. About 11, 11:30.
Q. What happened at that particular time?
A. We went down and cashed a money order that his mother sent us and we went down and paid for the rent on our TV.
Q. What time was that?
A. Between 11:30 and 12.
Q. What happened after that?
A. Well, after that we came home and I fed the baby and put her to bed.
Q. What time was that?
A. It was around 12, 12:30.
Q. What occurred after that?
A. Well, we just sat around and watched TV for a while. She was asleep.
And then, about 4, 4:15, I walked down to the corner store.
When I came back, I went in there to feed her and she was in the condition she was in when she went to the hospital.
Q. Describe that condition.
A. Well, the bruise on her forehead had swollen and she had two great big bruises on her cheeks and her eyes were rolled back in her head and she didn't have any response whatsoever.
Q. What happened after that?
A. Well, I went upstairs and called Caroline Kelly down, because she is a nurse. She said that we might take her over to the hospital because she might have a concussion. And Gary said to wait for a while to see if she would respond or we would call one of his friends.

But we waited for about half an hour and nothing happened, so we went ahead and went over to Homestead.

Q. What happened then?

A. Well, then the doctor looked at her and said to take her to Jackson Memorial.

Q. At Jackson Memorial, did you have any conversations with the doctors?

A. Yes.

Q. What did you say to the doctors and what did they say to you?

MR. MCWILLIAMS: Objection to that. That's hearsay, Judge; the conversations with a person outside the presence of the witness that I can cross-examine.

It's hearsay; Danny Herrell(phonetic), 217 So. 2d. It applies to the defendant, equally, as well as the State.

THE COURT: All right. Sustained.

Q. (By MR. MINKUS) Did you tell anybody at that particular time how the baby was injured?

A. No. I didn't know how she was injured.

Q. Calling your attention to a letter dated April 28, 1971, I ask you, is this your signature and did you write that letter?

A. Yes.

Q. To whom is that letter addressed?

A. To Gary.

Q. Would you please read it to the Court.

MR. MCWILLIAMS: Objection, your Honor; improper predicate.

THE COURT: Yes. Sustained.

MR. MINKUS: Well, your Honor, can I have argument?

THE COURT: Let's see it.

MR. MINKUS: I have a whole bunch of letters, your Honor.

THE COURT: I just want to see the one we are talking about.

MR. TUNKEY: It hasn't been marked for identification.

THE COURT: I know it.

MR. MCWILLIAMS: This is not cross-examination, Judge.

THE COURT: Sustained.

MR. MINKUS: Your Honor, may I speak to you out of the presence of the jury? May I address the Court?

THE COURT: All right.

Will the jury please step back into the jury room.

(Thereupon, at 7:44 o'clock p.m., the jury retired to the jury room.)

MR. MINKUS: Your Honor, at this particular time——

THE COURT: So it shows she loves him, is that what you are seeking to prove?

MR. MINKUS: Furthermore, she told him that she was pregnant. And the defendant will then testify that this is the reason why he made the statement, to protect her.

Furthermore, she testifies that she knows he did not do it. And, furthermore, she makes the statement——

THE COURT: Is there something there you are attempting to impeach the witness on? There's been no questions asked along these lines.

MR. MINKUS: Well, your Honor, I am just asking you: How do I go about entering these letters into evidence?

THE COURT: You don't, not unless there's something that she says that's contrary.

MR. MINKUS: May I show you this letter, your Honor.

THE COURT: Hand it up.

MR. MCWILLIAMS: These are all matters for cross-examination; if she were my witness, but she is not.

MR. MINKUS: And, specifically, the paragraph, the things that I have underlined.

THE COURT: I can read.

MR. MINKUS: In this letter, your Honor, she mentions the fact that she is expecting a baby and that she feels guilty about what she's done to the defendant.

MR. MCWILLIAMS: This is analagous to the State proving its case by police reports, Judge. He can ask any kind of questions he wants, so long as they are not leading. But he can't introduce letters.

THE COURT: Sustained.

MR. MINKUS: Well, your Honor, let me ask you this: Assuming I ask her if she wrote these——said these particular things?

THE COURT: Counsel, what you have shown me is a bunch of love letters to her husband from a girl who loves her husband, no matter what he has done. It says so.

MR. MINKUS: Your Honor, let me say this. It is of the

utmost importance I get these letters admitted into evidence and the jury hears them. I would like to get an adjournment so I can find out how to do that.

MR. MCWILLIAMS: Judge, we have no time for law school. We are proceeding in the middle of the trial.

THE COURT: He is a very adequate lawyer, you and I both know that. He doesn't need any law school. He's a fine practitioner and we both know he's a very fine trial attorney.

MR. MCWILLIAMS: Your Honor knows that there's no way that these letters are admissible on his case.

MR. MINKUS: For impeachment purposes.

THE COURT: But there's nothing to impeach.

MR. MINKUS: Could I call her as an adverse witness?

THE COURT: Do you want to let him?

MR. MCWILLIAMS: No. I object to it. She is not adverse. She will testify to the truth.

THE COURT: Let's go back to the question you primarily asked: "What happened on April 14th," and let her start from there. And then, if there's something to impeach, we can come to it.

I think we might be able to do it that way.

MR. MINKUS: Let me ask you this. If she makes a statement to the effect that she was out of the house at the time the baby was supposedly killed, your Honor——

THE COURT: She's already testified to that.

MR. MINKUS: She made a statement to the police officers, a written statement, where she omits mentioning that.

I have that statement right here, if your Honor wishes to see it.

MR. MCWILLIAMS: First of all, that's not even impeachment.

Second of all, he can't impeach his own witness. That's an elementary rule of evidence.

MR. MINKUS: But if she's an adverse witness——

THE COURT: But she isn't. Those letters show she is not an adverse witness. She loves him very much. It's perfectly obvious.

MR. MINKUS: Well, then, subsequently, your Honor, she says to——

MR. MCWILLIAMS: You know it was all a scheme.

MR. MINKUS: And she files a divorce suit against him.

And then, when she finds out she was subpoenaed by Mr. Tunkey, a week ago, she then writes him another love letter.

THE COURT: That's because she's in love with him.

MR. MINKUS: No, that's because she wants to protect herself.

THE COURT: We are going to have to proceed by the rules of evidence, counsel. She hasn't said anything for you to impeach.

MR. MINKUS: Well, she said that she was out of the house at the time that the baby was supposedly beaten, and I have evidence here that she said that she wasn't.

MR. MCWILLIAMS: That's tending to impeach his own witness, which is not admissible.

THE COURT: That's right.

MR. MINKUS: Well, your Honor, that's why I am asking your Honor. It's my understanding that it is within the purview of the Court to determine whether a witness is an adverse or hostile witness.

THE COURT: That's right, and, boy, this is not an adverse witness. And in the Court's opinion——

MR. MINKUS: Would you like to see her original statement to the police?

THE COURT: That has no bearing on it.

MR. MINKUS: Well, the whole bearing is that she was present the whole time in the house. She was never out of the house.

MR. MCWILLIAMS: It doesn't go to the admissibility of the type of things he is trying to get in, Judge.

MR. MINKUS: Yes, it does, your Honor, if you consider her an adverse witness.

THE COURT: She isn't.

This doesn't say that she was not out of the house.

MR. MINKUS: Then she gave another statement where she says she was out of the house and that statement was given on the afternoon when Sgt. Frank went over there and took Gary Maness to the Homestead Police Station.

MR. MCWILLIAMS: I am confident you have seen enough, Judge.

THE COURT: What?

MR. MCWILLIAMS: I am confident you have seen enough and you know she is not an adverse witness. She is not a hostile witness. She is a defense witness. She is not under cross-examination. So, I suggest we proceed.

MR. MINKUS: The State subpoenaed her, your Honor.

THE COURT: If they subpoenaed me, that doesn't mean I'd be their witness.

MR. MINKUS: Well, the fact that she's filed a suit for divorce, would that indicate she is a hostile witness?

MR. MCWILLIAMS: A hostile witness is one that won't answer the lawyer's questions when he asks questions on direct examination.

THE COURT: I have already ruled on that. Let's quit arguing about it.

There doesn't even seem to be anything inconsistent between the two statements.

MR. MINKUS: Except the fact in the first statement she never makes the statement she was out of the house.

THE COURT: Nobody asked her.

MR. MINKUS: Well, she volunteered the second statement.

THE COURT: I am sustaining the State's objection.

MR. MINKUS: Pardon?

THE COURT: I am sustaining the State's objection.

MR. MCWILLIAMS: Are you ready for the jury, Judge?

THE COURT: Yes.

Bring them in.

(Thereupon, at 7:50 o'clock p.m., the jury returned to the courtroom.)

THE COURT: State and defense concede the presence of the jury, note the presence of the defendant and counsel in open court, waive polling?

MR. MCWILLIAMS: Yes, your Honor.

THE COURT: Proceed.

Q. (By MR. MINKUS) Calling your attention to April 14th, what happened? Did you tell your husband on that particular date you were pregnant?

MR. MCWILLIAMS: Objection. She was in the middle of answering what happened on the 14th, and now he is leading her away. She should be allowed to finish her narrative.

Q. (By MR. MINKUS) Finish your narrative.

MR. MINKUS: I withdraw my question.

THE COURT: The question, ma'am, is, what happened on April 14th. Do it in narrative.

A. Okay. We walked down and paid for the rent for our TV. And we walked back home.

I fed the baby and put her to bed with her bottle. She went to sleep and we sat in there and watched TV until about 4 or 4:15.

I went down to the little corner store. When I came back, I went in to feed her and she was in the condition she was in when she went to the hospital.

Q. (By MR. MINKUS) In the morning, when you woke up, what was the condition of your baby?

A. She had one bruise on her forehead.

Q. How did she get that particular bruise?

A. I don't know.

Q. When was the first time you saw that bruise?

A. That morning.

Q. Were you with the baby all that night?

A. Both of us were.

Q. Were you with her the prior day?

A. Yes.

Q. And you never saw the bruise at that particular time?

A. No, I didn't.

Q. Did you file suit for divorce against——

MR. MCWILLIAMS: Objection. Objection. That's irrelevant.

THE COURT: Sustained.

Q. (By MR. MINKUS) When did you first notice the bruise on the side of your daughter's head?

A. In March.

Q. In March?

A. March. It was on a Saturday——no, it was on a Friday. It was just two small bruises on the side of her head and then, by Sunday, it spread all over the side of her face and the forehead and her eye was swollen.

Q. How did she get those bruises?

A. I don't know.

Q. Were you with the baby constantly prior to that time?

A. Yes.

Q. You do not know how she got those bruises?

A. I do not.

Q. Did you seek any medical treatment for her?

A. We took her down to Homestead. They said to take her back on Monday, so we took her back on Monday. The

doctor looked at her and said she'd be all right in a few days, that there weren't any broken blood vessels.

He said she'd be all right.

Q. Did you see anything wrong with your baby's arm during that period?

A. I can't remember. I don't know if it was during that time or not, but she started babying it.

Q. Do you know how the baby hurt her arm?

A. No.

Q. Is it not a fact that the baby hurt her arm——

MR. MCWILLIAMS: Objection.

Q. (By MR. MINKUS)——by falling in the crib?

MR. MCWILLIAMS: Objection.

THE COURT: Sustained. She says she doesn't know.

Q. (By MR. MINKUS) How did the baby hurt its leg?

A. I didn't even know she had a hurt leg until after she was dead.

Q. Well, the doctor has testified that she had——

MR. MCWILLIAMS: Objection.

THE COURT: Sustained.

Q. (By MR. MINKUS) You are unaware that your baby had a fractured leg?

A. Yes.

She was crawling around on it.

Q. Have you ever had any arguments with your husband?

A. Yes.

Q. When did you have arguments with him?

A. Oh, every now and then. I mean, everybody fights.

Q. Well, when was your last fight?

A. I can't remember.

Q. When was your fight before the last fight?

A. It was about the end of March.

Q. What did the fight concern?

A. Gary and myself.

Q. What was the nature of the argument?

A. He wanted me to go back home.

Q. What did he say to you and what did you say to him?

A. It wasn't really a fight. I told him if that's the way he wanted it, then I'd go back home.

Q. Are you pregnant?

A. No, I am not.

Q. Were you pregnant during March or April?

A. No.

Q. Were you pregnant in June or July?

A. No.

Q. Did you miss your period at any time during those particular months?

A. Yes, I did.

Q. Calling your attention to the week or three or four days in between, when your daughter was languishing in the hospital, and her death, did you have occasion to find any bloody clothes?

A. Yes.

Q. What were those bloody clothes?

A. The baby's.

Q. How did they get all bloody?

A. She had a cracked gum.

Q. Yes?

MR. MCWILLIAMS: Objection. "Yes," is not a question.

Q. (By MR. MINKUS) Well, how many pieces of clothes were bloody?

A. It wasn't clothes; it was blankets, baby blankets.

Q. How many baby blankets?

A. One or two.

Q. How bloody were they?

A. Not very bloody.

Q. How did the baby get bloody?

A. She had a cracked gum.

Q. How did she sustain that cracked gum?

A. I don't know.

Q. Were you with the baby prior to that time?

MR. MCWILLIAMS: Objection. That question is vague. It doesn't indicate any specific length of time or anything.

Q. (By MR. MINKUS) When did you find the baby clothes, the baby blankets with the blood all over them?

A. It was the Sunday before he took her to the hospital.

Q. And on Sunday, that Sunday, were you with the baby all day?

A. Both of us were, because Sunday was Easter Sunday.

Q. Were you with the baby?

A. Yes.

Q. Did you see your husband do anything to the baby?

A. No.
Q. On Saturday, were you with the baby all day?
A. I don't remember.
Q. Was Gary with the baby that day?
A. Well, if I wasn't, he was.
Q. Well, were you with the baby that day?
A. Saturday?
Q. Yes.
A. I don't remember.
Q. Did you ever refuse to give your child food and milk?
A. No, I did not.
Q. When you were in Texas?
A. No.
Q. While you were in St. Louis?
A. No.
Q. Did you ever tell anybody how the child sustained the fracture to its arm?
A. Not that I can recall.
Q. Did you ever tell anybody how the child sustained the bruises on its face?
A. Yes.
Q. Who did you tell?
A. Some friends of ours.
Q. Who are the friends?
A. I don't know what their names are. They just came over for dinner one Sunday, friends of Gary's.
Q. What did you tell them?

MR. MCWILLIAMS: Objection to the conversations with other parties not before the Court, Judge.

Q. (By MR. MINKUS) What day was this conversation had?
A. I don't know. It was on a Sunday.
Q. Who was present?
A. It was Gary, myself, the baby and his friend and his wife——

THE COURT: I am going to overrule it.

A. (Continuing)——and their little——I think it was a boy and a little girl, I think.
Q. (By MR. MINKUS) Didn't you just tell the Court that you didn't know how——

MR. MCWILLIAMS: Objection. Now he is cross-examining his own witness.
THE COURT: Sustained.

Q. (By MR. MINKUS) Before you came to Florida to see your husband, were you seeing another man?
A. I was not.

MR. MCWILLIAMS: Objection. That's not relevant.
THE COURT: Sustained.

MR. MINKUS: I have no other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. Linda, on your way to pay the TV bill, what did the defendant, Gary Maness, do to Misty?
A. Well, I was carrying her at first and she was kind of crabby. So, he took her from me and she kept crying. So, he hit her.
Q. How many times?
A. Two, at the most.
Q. Where?
A. On the face.
Q. Was this on the same date, April 14th?
A. Yes, it was.
Q. Now, later on when you came back to the house, how long was it that you were gone from the house when you went back to the store later that afternoon?
A. About 10, 15 minutes.
Q. Was it only after that time that you noticed other bruises on Misty's face?
A. Yes.
Q. Did you ever have any problem at all with injuries to Misty before you came to Miami on March 10th?
A. No.
Q. Did you ever observe Gary Maness slap or hit Misty in the right leg?
A. Yes.
Q. Will you tell the jury when and where.
A. We were driving home from Homestead Hospital, and we had the baby laying in the seat between us. She was kicking her legs. He reached down and slapped her on the leg.

Q. How did he do that?
A. Well, he just slapped her.
Q. Was it an easy slap or did he hit the baby hard?
A. Well, she had a red mark on her leg.
Q. Would you show the jury about where on her right leg she had the right mark.
A. It was about here (indicating).
Q. In the knee area?
A. Yes.
Q. Approximately how long prior to April 14th was this?
A. About a week.
Q. When, in relation to this incident, did you notice that Misty began favoring one of her legs, the right leg?
A. She didn't favor her legs. She crawled around on them.
Q. Did Gary Maness ever tell—— Would you tell the jury what he said to you when he told you to leave Miami.
A. Well, he told me that he wasn't ready to be married and that he didn't want to be tied down, and that I'd be better off at home.
Q. Did he tell you what to do with the baby?
A. He told me to take her with me.
Q. Did you ever witness any other incidents between Gary Maness and what you might call a member of the household, in which he displayed an action of violence?

Mr. Minkus: I object.
Mr. McWilliams: It certainly is relevant in relation to the testimony of Dr. Fogel, your Honor.
The Court: Overruled.

Q. (By Mr. McWilliams) Did you?
A. Yes.
Q. When and where?
A. Well, when I was still living in Texas, just before I had Misty, we had a little puppy. And he was giving her a bath one day and she started crying and everything. She didn't like the bath. And he got mad and a little while later, we were sitting in the living room and I was playing with the puppy and he just picked her up and threw her across the room into a box and hurt one of her legs.
Q. Will you tell the jury——let me ask you this: How many times have you seen Gary lose his temper?
A. I don't know.

Q. More than once?
A. Yes.
Q. More than twice?
A. Yes.
Q. On that occasion when he slapped the baby in the right leg, did you do anything to try and stop him?
A. I tried to pick her up.
Q. What did Gary Maness do to you?
A. He slapped me.
Q. Would you tell the jury what he does when he loses his temper.
A. He's like an entirely different person, like somebody I don't even know.

Mr. McWilliams: Nothing further.
The Court: Counsel?

Redirect Examination

By Mr. Minkus:

Q. Didn't you tell Mrs. McClain that Gary never slaps the baby on her, anywhere but on her bottom?
A. I only saw Mrs. McClain once.
Q. Well, didn't you tell the police officers that?
A. In the first statement.
Q. So then, you were lying when you made that statement to them, isn't that correct?
A. The first one.
Q. Isn't it a fact that he threw the baby——excuse me. I withdraw that.
Isn't it a fact that he threw the puppy across the room because of the fact that the dog was chewing on his shoes?
A. No.
Q. Didn't you tell the police officers in your second statement a statement to the effect that, and I quote——

Mr. McWilliams: Objection to quotes, Judge. He hasn't laid the proper predicate, according to the Florida Statutes on inconsistent statements.
Mr. Minkus: All right.

Q. (By Mr. Minkus) Did you make a statement to the police on April 25, 1971?
A. Yes.
Q. And in that statement did you say——

MR. MCWILLIAMS: Objection.
THE COURT: Sustained.
MR. MCWILLIAMS: I don't understand what counsel is driving at. What prior inconsistent statement he is getting to, of his own witness.
MR. MINKUS: She just said that he loses his temper. And in there, he says——
MR. MCWILLIAMS: Objection to him quoting from something that he can't admit properly into evidence, Judge.
THE COURT: Sustained.

Q. (By Mr. Minkus) Did you ever tell the police officers that Gary Maness——

MR. MCWILLIAMS: Objection. He has not laid the proper predicate for any inconsistent statements. There's a specific statutory way to do that.
THE COURT: Sustained.
MR. MINKUS: I have no further questions.
MR. MCWILLIAMS: I have nothing further of the witness, Judge.
THE COURT: All right.
Who is your next witness, counsel?
MR. MINKUS: The defendant.

(Thereupon, the defendant was sworn.)
Thereupon——

GARY MANESS,

the Defendant herein, was called as a witness on his own behalf and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Gary, did you kill your baby?
A. No, sir.
Q. Did you strike her in the face at any time?
A. No, sir.
Q. Okay.
Calling your attention to April 14, 1971, what time did you get up in the morning?
A. 5:30.

Q. What did you do when you got up in the morning?
A. I got ready for work, went outside and caught the bus.
Q. What did you do after that?
A. I went out to the battery and we pulled dailies down there, missiles, and I caught the duty driver back into Homestead.
I waited until the bank opened to get a money order cashed and I got the money order cashed.
I went across the street to a pawn shop and I bought a tear gas gun and I went home.
Q. What did you do after that?
A. When I got home my wife was in the bedroom with my daughter, changing her.
Q. Did you notice anything about your daughter's condition at that particular time?
A. She had a big bruise on her forehead.
Q. Do you know how she got that bruise?
A. No, sir.
Q. Did your wife tell you how she got that bruise?
A. No, sir.
Q. Did you ask her how she got the bruise?
A. Yes, sir.
Q. What did she say to you?
A. She said she didn't know.
Q. What happened after that?
A. I went into the kitchen and got some ice and a washrag and came back in the bedroom and put it on the baby's head.
I told my wife to hold the ice on her head and I'd go fix something to eat.
Q. What happened after that?
A. Well, she put the baby to bed. She came in the kitchen. We ate dinner.
I told her I was going to go down and make a payment on our TV. She asked if she could go. I said she could go.
She went and got the baby ready and we went down and paid on our TV.
Q. What did you do after that, Gary?
A. We walked back to our house.
Q. What happened at your house?
A. We got back, I guess, about 12:30 or 12. She put the baby to bed in the bedroom and gave her her bottle.

She came out into the living room, where I was at, and we were watching TV.

She closed the bedroom door and sat down and we started talking.

Q. What happened after that?

A. We had an argument.

Q. What was the argument concerning?

A. Her having another baby.

Q. Well, what did you say to her?

A. I wanted her to have another baby before I got out of the Army, because the Army would pay for it, because I couldn't afford it when I first got out.

Q. What did she say?

A. She said she didn't want any more babies.

Q. What happened after that?

A. I got kind of mad, so I went outside in front with the teargas gun I had and I was shooting it off outside in front of the house.

Q. What happened after that?

A. After a little while, she came outside and said she was going to have a baby anyway, that it didn't much matter.

Q. Did you do anything after that?

A. We made up and went back inside and watched TV until 4:00.

Q. What occurred after that?

A. I told her I'd cook supper and to wake Misty up to feed her supper. She said she would.

So, she went in the bedroom to get the baby up and she called me in there.

Q. What happened when you came into the baby's bedroom?

A. She had Misty in her arms and she was real pale and limp. She wasn't moving.

Q. What did you do?

A. Well, I didn't know what to do. I took her and got a washrag and washed her face with it. She wouldn't respond. She would get real tight and then real limp again.

The girl from upstairs came down. My wife said she was going to go upstairs and get the girl to come down and look at her.

I said, "All right.

She went upstairs and got the girl from upstairs to come down and look at my daughter.

The girl from upstairs said she did n't know what was wrong with her and said it would be a good idea if we took her to the doctor.

Q. Did you take the baby to the doctor then?

A. I told the girl upstairs that I'd call a guy from the battery or my sergeant and have him come down and take us.

So, he never came, so we asked the girl upstairs if she'd take us to the hospital. She said she would.

So, we went over to the Air Force base to the hospital.

Q. What happened there?

A. When we got there, one of the doctors looked at my daughter and then put us in an ambulance and sent us to Jackson.

Q. Did anything occur at Jackson Hospital?

A. Well, one of the doctors, the interns, I don't know whether it was interns or doctors, they told me to go downstairs and check my daughter in. And they wanted to talk to Linda.

So, we went downstairs and checked my daughter in and signed all the paperwork in and everything.

And I came upstairs and asked Linda what they talked to her about. She said they wanted her to say I beat the baby.

Q. Did they ask you how the baby was hurt?

A. Yes, sir.

Q. What did they say to you?

A. They asked me if I know how she got all bruised up like that.

Q. What did you tell him?

A. I told them she had the habit of hitting her head against the baby bed and with the bottle once in a while.

Q. Do you know she did that? Did you ever see her do that?

A. No, sir.

Q. How do you know that?

A. Linda told me.

Q. When did she tell you that?

A. When I asked her about the bruises.

Q. When was the first time you asked her?

A. About two weeks before she went in the hospital.

Q. Was that the first time she went to the hospital?
A. No, sir.
Q. When was the first time she went to the hospital?
A. We took her on, I believe it was a Sunday night, the first time we took her. I am not sure.

We went to the emergency room and they said to bring her back the next day, a baby doctor.

Q. What was wrong with the baby at that time?
A. She had a bruise on her right cheek.
Q. Do you know how she got that bruise?
A. No, sir.
Q. Did you take the baby to the hospital the next day?
A. Yes, sir.
Q. On the way to the hospital, did you see Mrs. McClain?
A. Yes, sir.
Q. At that particular time, what was the conversation between you and Mrs. McClain?
A. I asked——
Q. And Mrs. Keith.

MR. MCWILLIAMS: Objection.
THE COURT: Mrs. who?
MR. MINKUS: Keith, the one who testified.
THE COURT: Sustained.

Q. (By Mr. Minkus) Is what Mrs. Keith said about the conversation accurate?
A. No, sir.
Q. What was the conversation that occurred?
A. Mrs. McClain asked if she could see the baby. I said, "Yes, she is out in the car."

I told her she had a bruise on her cheek, that it looked like she had been in a fight and lost. And we all kind of laughed about it and went out to the car with Misty.

Q. And then what happened?
A. Then they talked about the babies; about her baby and about our baby. Then we went to the doctor's.
Q. What did you do after that?
A. While we was at the doctor's office, I had to take my wife home. I had to take Mrs. Keith's car back to her.

On the way back to the house, Linda got mad because Misty was kicking and hollering, so she slapped her.

Q. She slapped the baby?
A. Yes, sir.

Q. Where did she slap the baby?
A. On the right leg.
Q. How many times did she slap her?
A. Twice.
Q. Did she slap her hard?
A. Pretty hard.
Q. What happened after that?
A. I told her to stop, and she said she didn't have to, that it was her baby.
Q. What did you do?
A. I guess I kind of got mad, so I slapped her.
Q. What happened? You slapped who?
A. Linda.
Q. What happened after that?
A. I took her home and she got the baby and got out of the car.

I told her I was going to take the car back to Mrs. Keith, so I did.

Q. Did anything unusual happen that night or the next day, if you recall?
A. Not that I recall.
Q. Okay.

Now, did you ever see your baby have trouble with its arm?

A. She couldn't hold her bottle for a while. I asked Linda what was wrong with her, and she said she found her arms stuck through the bars in the baby bed and she thought she hurt it.

Q. What did you do at that particular time?
A. Well, the next day we went out to the battery. I talked to our medic out there and told him what was wrong. He said there wasn't no bruises or nothing and she probably sprained it. And if she didn't use it after a while, to take her to the doctor.
Q. Did you do anything about the arm after that?
A. About three days later, I took Misty out to the battery with me and talked to the sergeant and the other guys.

Our medic looked at her arm and he said he didn't think there was anything wrong with it.

Q. Now, calling your attention to the time when your baby was in the hospital with the hemorrhage and dying, were you questioned by the police at that particular time?

A. I was questioned by some investigator from Child Care. I think it's the organization——

Q. What did you tell him?

MR. MCWILLIAMS: Objection, your Honor.

THE COURT: Sustained.

MR. MINKUS: Okay.

Q. (By Mr. Minkus) Subsequently, your baby died, is that correct?

A. Yes, sir.

Q. What did you do after your baby died?

A. Well, I went through a lot of, I guess you call it, red tape with the Army to get permission to go home to bury my daughter.

Q. What happened after that?

A. I took her home to bury my daughter. We took her to Tennessee, Allentown. We buried her and come back the following Saturday.

Q. At that particular time, did you see any officers, police officers?

A. I didn't see any police officers until the next night, Sunday night.

Q. Okay. When did you see Sgt. Frank?

A. That Sunday night.

Q. How did you come to see Sgt. Frank?

A. He came over to the house to question my wife and myself.

Q. And what happened?

A. He said that he wanted to talk to us one at a time. I told him Linda had to stay at the hospital with my mother-in-law.

He said, "All right." He said he'd take us one at a time to the Homestead Police Department. He said he wanted to take Linda first.

So, he left with Linda and stayed gone for about an hour and a half to two hours, and brought her back.

Then, he took me over.

Q. What happened at the police station?

A. Sgt. Frank took me to, I guess, a questioning room in the back at the police station, him and his partner.

And he sat me down and Sgt. Frank started walking back and forth and he grabbed my face and he called me a son of a bitch and told me I wasn't no good and I didn't deserve to live.

And then, he said he know I killed my daughter and he said he knew how I killed her.

And I told him I didn't know what he was talking about.

He said, "Well, I know your wife went to the store and you went in there and lost your cool and slapped her. That's how she got her arm broken."

He said, "That's how she died."

I told him I still didn't know what he was talking about.

He said, "The lady upstairs said she saw you perk her across the car. That's how you broke her arm."

And he said, "When you were coming back from the hospital you slapped her on the leg and that's how you broke her leg."

He kind of got mad a little bit and called me a few more things and then he said he was sick and couldn't look at me any more and told his partner that.

And then his partner walked over to me and asked me did I ever go to the store.

I told him, "Yes, I walk to the store."

He said, "You better stop. People got killed going to the store at night. Do you know what I mean?"

I said, "Yes, I know what you mean."

Q. Then what happened?

A. Well, he told Sgt. Frank that I wasn't going to say anything to him, so he might as well take me home. And Sgt. Frank agreed with him and we started walking out.

And his partner said, "Do you want us to take you home or do you want to walk home?"

I told him I could walk home because it wasn't too far from the house.

So, he said, "We better take you home. You might get killed walking home."

And Sgt. Frank, before I got out of the car, told me to remember what he said about my wife if I wanted to help her out. He said I knew what to do and not to leave town.

Q. What happened then?

A. I went inside the house and I asked Linda what she told them, getting them all excited like they were at me.

She told me she said that she went to the store that day and left me alone in the house with the baby.

And I asked her why she said something like that. She said, "Well, you told me to at the hospital."

Q. Did you tell her that at the hospital?

A. Yes, sir.

Q. Why did you tell her that at the hospital?

A. Well, the inspector that talked to us said one of us would go to jail.

I told her I'd go because I didn't want her and my baby going to jail.

Q. What do you mean when you say you didn't want to hurt your baby by having your wife go to jail?

A. That I didn't want to hurt?

Well, she told me she was pregnant that day that Misty got sick.

Q. Did she tell you on other occasions that she was pregnant?

A. Yes, sir.

Q. What other occasions were there?

A. She told me once when we went home to Tennessee that she was pregnant and she wrote me a couple of times that she was pregnant.

Q. What happened the next day when you saw Sgt. Frank?

A. Sgt. Frank and his partner came over to my house and had a warrant for my arrest. Sgt. Frank's partner put the handcuffs on me and took me out to the car.

Sgt. Frank talked to my wife a little bit and he came out and we came to Metro.

Q. What happened then?

A. Well, on the way down to Metro here, I don't think he said it. I think his partner said it to him about how I was going to get screwed when I got down here, by the jailer. And then, he talked about an auto wreck he saw between two cop cars. We saw—or a police car—that was involved in it.

And when we got down here we was getting out of the car. There was a bunch of police officers in the front.

And his partner came to Sgt. Frank, the one from Sunday night.

He said, "You finally got him." And then he said, "We got the son of a bitch."

And they took me inside.

Q. What did Sgt. Frank say?

A. Sgt. Frank took me up to his office and closed the door and told me, he says, "We know you did it. We have got proof that you did it."

I told him I didn't do it, I didn't know what he was talking about.

He says, "Well, now, Linda could get in a lot of trouble and go to jail over this. They treat women pretty bad in the Dade County Jail."

I said, "I know. I heard about it in the papers and heard it on the TV."

He said, "The only way you can save her is to give a confession saying she had nothing to do with it."

Q. What happened then?

A. Then I told him I didn't know. I wanted to talk to Linda first.

He said, "All right."

He dialed my home phone number for me and I talked to Linda on the phone. I told her I was going to say I did it because she was going to go to jail, too. I didn't want her to go to jail.

I told her to call my folks and tell them why I did it.

Q. Did you ask to see a lawyer?

A. They came in afterwards when he was giving me my rights with a lawyer. I said, "I'd like to see a lawyer."

He said, "Well, if you see a lawyer, we won't talk to you no more about your wife."

Q. That's when you made the statement to him, correct?

A. Yes, sir.

Q. Is that statement true?

A. No, sir.

Q. Why did you make that statement?

A. Because I didn't want my wife and my baby going to jail.

Q. You mean your pregnant wife?

A. Yes, sir.

Q. Did your wife ever apologize to you for what she's done to you?

MR. MCWILLIAMS: Objection, your Honor.

THE COURT: Sustained.

MR. MINKUS: I have no other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. The statement you gave to Sgt. Frank, was sworn to and subscribed before a Notary Public, isn't that correct, Gary?

A. I signed it. I guess it was signed by a Notary Public, I don't know.

Q. In other words, you were sworn in. You were sworn to tell the truth, the whole truth and nothing but the truth, under oath, when you gave that statement, is that true?

A. I believe the stenographer was the one. I am not sure.

Q. Now, you are giving a different sworn statement, is that correct?

A. Sir?

Q. Now, you are giving a different sworn statement, is that correct?

A. I don't understand what you mean.

MR. MCWILLIAMS: I will withdraw that question.

Q. (By Mr. McWilliams) When Misty and Linda first came down to Miami on March 10th, isn't it a fact that you didn't notice any bruises on Misty at that time?

A. Yes, sir.

Q. The only bruises you noticed came after Linda and Misty came down to live with you, isn't that a fact?

A. Yes, sir.

Q. When did you first begin feeling tied down or oppressed by your marriage?

A. I never did, sir.

Q. When did you first begin discussing divorce with Linda?

A. When she called me up and told me she was going to leave me, and then send me divorce papers.

Q. Well, did you have occasion to discuss divorce with her while she was in Miami?

A. Yes, sir.

Q. Did you tell her to leave Miami with the baby?

A. No, sir.

Q. So, your wife is lying when she testifies to that?

A. That's right, sir.

Q. You married your wife originally because she was pregnant, isn't that a fact?

A. No, sir.

Q. Was she pregnant when you married her?

A. Yes, sir.

Q. And you are testifying that the never entered into your considerations on marrying your wife?

A. I didn't know she was pregnant until two weeks after we were engaged.

Q. Isn't it a fact that you became oppressed with the marriage, that you felt the child was an undue burden and was one of the causes of you being married?

A. No, sir.

Q. Isn't it a fact that you felt that your wife and the child were burdens on your life?

A. No, sir.

Q. Did you ever tell anybody else that marriage wasn't for you, that you had made a mistake?

A. No, sir, I didn't.

Q. Did you ever make any statements to anybody that you didn't like being married, you were unhappy with marriage?

A. Not that I recall, sir.

Q. Yet, you told your wife to leave Miami while she was here living with you?

A. No, sir. I didn't tell her to leave Miami.

Q. Have you ever made any statements, inconsistent with what you have made here today?

A. I don't understand what you mean.

Q. Have you ever told anybody else anything different than what you are telling the jury today?

A. Yes, sir.

Q. Do you know Shirley Bliffert?

A. Who, sir?

Q. Shirley Bliffert?

A. No, sir.

Q. A waitress where you usually eat, in Homestead?

A. No, sir.

Q. Did you ever tell any waitresses at the place you eat you didn't like marriage, that it didn't agree with you?

A. Places I eat?

Q. Yes.

A. In Homestead?

Q. By the Air Force base, by the Army base.

A. No, sir.

Q. Of course, you didn't know Madeline Keith, did you?

A. Madeline Keith?

Q. Yes.

A. I met her.

Q. I mean, prior to that one half-hour meeting, you had never met her before, isn't that correct?

A. I don't believe so.

Q. And you have never met her since, isn't that a fact?

A. Yes, sir.

Q. You have never had any argument or quarrels or discussions with her, isn't that a fact?

A. Yes, sir.

Q. And she wasn't a friend of the family, was she?

A. Not that I know of.

Q. In fact, there's no connection whatsoever between her and your family, is there?

A. No, sir.

Q. Are you saying that she came in here and lied when she testified about what you said about the baby being beaten?

A. I am saying I didn't say it, sir.

Q. Well, is she mistaken?

A. Yes, sir.

Q. What kind of bruise did the baby have on its face when you and Madeline Keith were looking at the baby and conversing over the bruises?

A. She had a bruise on her right cheek.

Q. How big?

A. It was two small bruises, here and here (indicating), about the size of my thumb.

Q. About the size of what?

A. My thumb.

Q. Were they black and blue?

A. They were a light kind of a bluish looking.

Q. And was the child crying?

A. No, sir.

Q. Did you tell her that it wouldn't be a good time to look at the baby because it looked like it had been beaten again?

A. No, sir.

Q. But, you don't really know that woman at all, do you?

A. No, sir.

Q. And it is a fact that when you were discussing the bruises on the baby's face that you were laughing, isn't that a fact?

A. No, sir.

Q. Well, didn't you just testify on direct testimony when your lawyer asked you that, you had a conversation about it, that it looked like the baby lost a fight and you began to laugh?

A. That's when we were discussing it first.

Q. Well, when you were discussing the baby's injuries with Madeline Keith, you were laughing, weren't you?

A. No, sir. We weren't discussing her injuries.

Q. Well, were you discussing it looked like the baby lost a fight?

A. Yes, sir.

Q. And that's why the baby was in such a condition as it was?

A. Yes, sir.

Q. And you were laughing at the same time, weren't you?

A. Yes, sir.

Q. Would you please tell the jury about the incident where you grabbed Misty's left arm and jerked her in the car. Tell the jury what happened.

A. Yes, sir. We came home. I don't know where we had been. I think we had been to the doctor's or someplace.

Then, we got out of the car. I went around to the passenger side and reached in and grabbed Misty by her right arm and underneath her left arm and slid her across the seat.

Q. How soon after that did you notice she began favoring her left arm?

A. A week or so.

Q. Of course, you have never slapped Misty, like your wife has testified to a minute ago, while she was crying, have you?

A. No, sir, I haven't.

Q. That was a lie?

A. That's right, sir.

Q. And you never jerked the child roughly across the back seat, like Mrs. Kelly testified to?

A. That's right, sir.

Q. That's a lie, also?

A. That's right, sir.

Q. And, of course, I suppose you didn't fling the puppy across the room and injure its leg, did you, now?

A. Yes, sir, I did.

Q. All right.

Was that because the puppy was whining or crying?

A. No, sir.

Q. Did you fling it against the wall or against the floor?

A. Floor.

Q. How far did you throw that puppy?

A. About as far as from her to that desk.
Q. How old was the puppy?
A. A month or two.
Q. What did you do to its leg?
A. What did I do to its leg?
Q. What happened to the puppy's leg as a result of you throwing it against the wall?
A. Nothing happened to it.
Q. It didn't get injured at all, is that what your testimony is?
A. It was walking on it.
Q. Was it injured or not?
A. Not to my recollection, no.
Q. Then, your wife is lying when she testified to that, is that correct?
A. Apparently so.
Q. Now, you say you gave this sworn confession to Sgt. Frank to protect your wife?
A. Yes, sir.
Q. And, yet, you say Sgt. Frank told you he knew that you did it?
A. Yes, sir.
Q. Is that what you are telling the jury?
A. That's what he told me.
Q. So that when you talked to Sgt. Frank, he didn't tell you that your wife was the suspect in the case, did he? He told you he knew you did it.
A. He said I did it, but my wife would probably go to jail, too.
Q. So, your testimony to the jury is that you gave the confession because he said you did it and your wife was going to go to jail, because you did it?
A. He didn't say she was going to. He said she would probably go to jail, too. There was a good chance of it.
Q. Because he knew you did it?
A. He didn't say that. He said what I told you.
Q. He didn't say he knew you did it?
A. Yes, sir, he said that.
Q. Have you ever struck Misty?
A. Yes, sir.
Q. How many times?

A. Three or four.
Q. Isn't it a fact that it was because the baby was crying that you struck the child?
A. Not all the time, no, sir.
Q. Most of the time?
A. No, sir.
Q. Well, why did you strike the child?
A. She'd pull things off the coffee table and stuff like that.
Q. Isn't it a fact that when you struck the child it was in the face you struck the child?
A. No, sir.
Q. Well, how many times was it that you struck the child on the face?
A. Never, sir.
Q. Is it your testimony that your child inflicted those wounds by striking herself with the baby bottle?
A. I told what I was told. That's all I know.
Q. Is that what you are telling the jury? Did you ever see the baby strike its head with the baby bottle?
A. No, sir.
Q. Did you ever see the baby strike its head against the side of the crib?
A. No, sir.
Q. You did have occasion to hit Misty in the right leg within six weeks prior to her death, didn't you, or slap her, however you want to put it?
A. I don't believe so.
Q. Didn't there come a time in the car when you had some physical contact with her right leg?
A. No, sir.
Q. So that your wife is lying when she testified to that while she was crying?
A. Yes, sir.
Q. Did you tell your wife that you were going to get a divorce from her?
A. Did I?
Q. Yes.
A. No, sir.
Q. Did you tell her to leave town with the baby?
A. No, sir.
Q. Did you ever discuss divorce with her while she was in Miami, living with you?

A. No, sir.
Q. Were you happy in your married life?
A. Yes, sir.
Q. Did you ever tell anyone that you weren't happy in your married life?
A. Yes, sir, I did.
Q. Who did you tell that to?
A. I told one of the guys in the battery that once.
Q. Why did you tell him that?
A. That's when my wife told me she wanted a divorce.
Q. Did you ever tell anyone else that you didn't like married life, that you just weren't cut out for married life?
A. No, sir.
Q. Did you tell Madeline Keith that you did not like the responsibility of being married?
A. No, sir.
Q. So that she is lying when she testified to that?
A. That's right, sir.
MR. MCWILLIAMS: If you will give me just a minute, your Honor.
Q. (By Mr. McWilliams) You say there was an argument on the date of the 14th? There was an argument over the baby?
A. Yes, sir.
Before the baby was injured, is that correct?
A. Yes, sir.
Q. And that argument was over having another baby, isn't that a fact?
A. Yes, sir.
Q. Isn't it a fact that you felt an undue burden of having a responsibility of being a father to that child?
A. No, sir.
Q. And isn't it a fact that when the subject of another baby came up, you went in there and beat that baby to stop that baby from living?
A. No, sir.
Q. But there was discussion about having another baby before the child was injured, isn't that a fact?
A. Before we found her, yes, sir.
Q. And your wife was out of the house about 15 minutes

after this conversation and before you discovered the injuries, isn't that a fact?
A. No, sir.
Q. Well, how long was she gone?
A. She wasn't gone, sir.
Q. So, she is lying when she testified she went to the store?
A. That's right, sir.
Q. Did you ever say that she went to the store?
A. Yes, sir.
Q. When did you say that?
A. In the statement I made.
Q. Well, did you rehearse this statement before you made it to Sgt. Frank?
A. To myself I did.
Q. In other words, you made what was it, a minute phone call to your wife?
A. About a minute.
Q. And then you came back and made the statement to Sgt. Frank?
A. Sgt. Frank was in the room with me.
Q. And you hadn't gone over the details of what you were going to say because you didn't know you were going to make the statement, isn't that correct?
A. I was ready to say it, if I had to.
Q. Yet, you say in the statement— Isn't it a fact that you admitted in the statement that your wife left the house and went to the store?
A. In the statement, yes, sir.
Q. But you deny that?
A. Yes, sir.
Q. Now you say you never rehearsed that statement before you gave it to Sgt. Frank?
A. I said I did, to myself.
Q. So that you say you were lying in the statement when you say your wife went to the store?
A. Yes, sir.
Q. And your wife is lying when she went to the store?
A. Yes, sir.
Q. And you had never gotten together beforehand? You never discussed what you were going to say with your wife?
A. I told my wife what to say at the hospital.
Q. Before giving this statement to Sgt. Frank, you didn't

ask her: "What am I going to say? Let's get our stories together"?

A. No, sir.

Q. You did most of the talking at the hospital when you talked to the doctors, isn't that a fact?

A. Yes, sir.

Q. You're the one that told the doctors the baby suffered the injury by beating its head with a bottle, isn't that a fact?

A. Yes, sir.

Q. And that was a lie, wasn't it?

A. That's what I was told.

Q. You are the one that told the doctors who were trying to save your baby's life that the child had fallen down or gotten caught in its crib, isn't that a fact?

A. Yes, sir.

Q. And that was a lie?

A. That's what I was told.

Q. And your baby was lying there dying, wasn't it?

A. Yes, sir.

Q. Would you lie under oath to save your own life?

A. No, sir.

Q. Did you lie when your baby's life was at stake?

A. No, sir.

Q. Didn't you just admit that you lied to those doctors when they were asking you questions about how your baby got injured? Did you lie to Dr. Sturge when he asked you how the baby got injured?

A. Dr. Sturge? Which one is that?

Q. That's the military doctor at the base.

A. No, sir, I didn't lie to him.

Q. Did you tell him that the baby beat itself in the head?

A. I told him that's how I was told it had happened.

Q. Didn't you just admit that you lied to the doctors when you told them about what happened?

A. No, sir.

Q. Are you changing your testimony now?

A. I said what, you know——

Q. Did you lie when you told the doctors, first Dr. Sturge at the base hospital, how the baby got its injuries?

A. I told Dr. Sturge at the base hospital how my wife told me that she had been getting hurt.

Q. In other words, what you are saying now is: "I really

don't know how the baby got hurt, but my wife said that——"

A. That's right, sir.

Q. So that Dr. Sturge is lying when he testified that you told him the baby hit its head with a bottle?

A. No, sir.

Q. Is he mistaken?

A. No, sir. I said that.

Q. That was not true, was it?

A. As far as I know, it was.

Q. Did you tell Dr. Fogel that the child had beat its head against the crib and with the bottle?

A. I believe I did, sir.

Q. Was that the truth?

A. As far as I know.

Q. Are you telling the jury that's how the baby died, by hitting its head against the crib and with the bottle?

A. As far as I know it is, sir.

Q. And your testimony is that you told Linda what to say at the hospital, isn't that correct?

A. Yes, sir.

Q. In other words, you were the main speaker while you were speaking to all the doctors?

A. No, sir.

Q. You didn't tell the doctors that you had slapped Misty earlier that morning, did you?

A. No, sir.

Q. And the doctors were trying to save your baby's life, weren't they?

A. Yes, sir.

Q. And your testimony is that you wouldn't lie to save your own life?

A. No, sir.

MR. MCWILLIAMS: I have no further questions.

REDIRECT EXAMINATION

By MR. MINKUS:

Q. You stated that you threw the puppy across the room?

A. Yes, sir.

Q. Why did you do that?

A. Because it kept going to the bathroom in my boots. And Linda, she cared more for that dog than she did any-

thing else. She let it walk on her when she was pregnant, she'd sit on her belly and it would walk all over her.

Q. Why did you tell your wife at the hospital to make the statement that she went down to the store at that particular time?

A. Because the investigator came up and said that one of us would go to jail if Misty died.

Q. Did your wife tell you anything at that particular time?

A. No, sir. I can't recall.

Q. Well, what was the reason you told her to make that statement?

A. I told her if one of us had to go to jail, that I would.

Q. Why did you tell her to make that statement?

A. Because she was pregnant.

Q. How do you know she was pregnant?

A. She told me so.

Q. When did she tell you she was pregnant?

A. That day that we brought Misty in.

Q. Now, when you say you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said, "That's as far as I know," how do you know that's how it happened?

A. Because Linda told me.

Q. When did she tell you that?

A. When I asked her how she got the bruises.

Q. When was the first time you asked her how she got the bruises on her face?

A. I guess they'd been down here about three weeks.

Q. Is that when your wife said she doesn't know how she got the bruises on her face?

A. I guess so, sir.

Q. When was the second time?

Well, how about the morning of April 14, when you woke up and found your baby with a big bruise on its forehead, did you ask her or—— Excuse me. I withdraw that question.

You testified that when you came home from work on April 14th, the day the baby was taken to the hospital, you found the baby with a big bump on its forehead, is that correct?

A. Yes, sir.

Q. Did you ask Linda then how she got that big bruise on her forehead?

A. Yes, sir.

Q. What did she say?

A. She said she didn't know.

Q. And when you saw the big bruises on her when you came back into the house after shooting the gun in the yard and she called you into the house, did you ask her then how it happened?

A. Yes, sir.

Q. What did she say?

A. She said she didn't know.

Q. Did you ever ask your wife how the baby hurt her arm?

A. Yes, sir.

Q. And what did she tell you?

A. She said she found it laying in bed one day with its arm hanging out between the bars. And she thought that's how it happened.

Q. So, it's your statement to this Court that your wife told you that she was pregnant on April 14, 1971?

MR. MCWILLIAMS: It's repetitious.

A. Yes, sir.

MR. MCWILLIAMS: Objection.
THE COURT: Overruled.

Q. (By Mr. Minkus) And that for the purpose of protecting her and that unborn child, you made the statement after you buried your baby on April 27, 1971, that you slapped the baby and that you did it?

A. Yes, sir.

MR. MINKUS: I have no other questions.
MR. MCWILLIAMS: One other question.

RECROSS EXAMINATION

By MR. MCWILLIAMS:

Q. I noticed your wife was crying while she was testifying.

Did you, in fact, while your baby was dying at the hospital there, did you show any remorse or grief over the critical condition of your baby?

A. Yes, sir, I did.

Q. Then, if Lt. Col. or Major, that oak leaf cluster, the

doctor there from the military base, was he lying under oath?

A. He wasn't with us all the time.

Q. Well, you heard him testify you appeared rather nonchalant?

MR. MINKUS: I object. He didn't say that.

THE COURT: Overruled.

Q. (By Mr. McWilliams) Did you hear the doctor testify as to what your physical condition was when you came in the hospital?

A. Yes, sir, I heard him.

Q. And was that doctor mistaken?

A. I was, I guess you call it, in a state of shock. It didn't really dawn on me what was really going on.

Q. Did you, in fact, cry at the hospital or show any remorse?

A. Yes, sir, I did.

Q. Then the doctor is not telling the truth, is that what you are telling us?

A. At Jackson Hospital.

Q. Well, is Dr. Fogel mistaken?

A. Dr. Fogel wasn't with us all the time, either, sir.

Q. And, of course, at the base, down at the military base, Dr. Sturge did tell you he thought the child was very seriously injured, didn't he?

A. Yes, sir.

Q. You didn't cry at that time, did you?

A. No, sir.

Q. Did you laugh?

A. No, sir.

MR. MCWILLIAMS: I have no further questions.

MR. MINKUS: I have no questions.

THE COURT: Next witness.

MR. MINKUS: Would you please call Dana Maness to the stand.

(Thereupon, the witness was sworn.)

Thereupon——

DANA MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Calling your attention to——

THE COURT: Let's find out who she is.

MR. MINKUS: Oh, yes.

Q. (By Mr. Minkus) What is your name?

A. Dana Maness.

Q. What is your address?

A. 95 Kenlingwood (phonetic), Brentwood, Missouri.

Q. What relation are you to the accused?

A. His sister-in-law.

Q. Calling your attention to April 22, 1971, did you have occasion to have a conversation with one, Linda Maness?

A. Yes——

MR. MCWILLIAMS: Objection.

A. (Continuing)——I did.

THE COURT: Sustained, until we find out what the purpose is.

Q. (By Mr. Minkus) Dana——

MR. MINKUS: Well——

THE COURT: Do you want to make a proffer outside the presence of the jury?

MR. MINKUS: Yes, I do.

THE COURT: All right.

Ladies and gentlemen, step into the jury room for a moment.

(Thereupon, at 8:55 o'clock p.m., the jury retired to the jury room.)

THE COURT: Proffer. Just tell me——

MR. MINKUS: She is going to state that there was a conversation in an automobile in Tennessee where they were burying the baby and there was also another girl present, the sister of the defendant, who was not able to be here because she is having a baby, where she said—where Linda Maness said—that Gary did not touch the baby; that she did not know what happened and that she never left her home to go to the store and leave the baby alone during the date of April 14, 1971.

MR. MCWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.

MR. MINKUS: Well then, there was another conversation on April 23, wherein Linda Maness made the statement to the effect that Gary didn't do it.

MR. MCWILLIAMS: Same objection.

THE COURT: Sustained.

MR. MINKUS: I don't have any questions of this witness, then.

THE COURT: All right.

How many more witnesses do you have?

MR. MINKUS: I have one—oh, I have about two, two or three.

THE COURT: All right. Do you want to proffer what that is, so that we don't have the jury running in and out?

Ma'am, would you step outside, please.

MR. MINKUS: Mrs. Maness came.

MR. MCWILLIAMS: What's her first name?

MR. MINKUS: Mrs. Ruth Maness, the mother of the defendant. She came to the home of the accused during the week of April 14 to the 22nd, or until the 18th, while the baby was lying in the hospital; that there were found some bloody baby blankets, and that Linda Maness was asked, "How did this blood get on these?" And she said that they got on the blanket because she had her period.

MR. MCWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.

It will be sustained.

MR. MINKUS: I don't—I only have witnesses, these three witnesses, then, your Honor, with regard to the character of the defendant.

MR. MCWILLIAMS: I have a right to voir dire two of them. One of them, I admit, has a basis for knowing the defendant's reputation for truth and veracity and the other two do not. As long as the jury is out, can I voir dire them?

THE COURT: Yes.

MR. MCWILLIAMS: All right.

The only one that I am not going to voir dire on that is——

THE COURT: Now, I don't want to get into character, just specific questions to be asked and I assume we are going to stick just to those.

MR. MCWILLIAMS: All right.

Chaplain Welsh.

MR. MINKUS: He is gone. I am not calling him, anyway.

THE COURT: Who is calling him?

MR. MCWILLIAMS: Capt Peters, is he here?

MR. MINKUS: Yes, I think he is.

THE COURT: What do you want, voir dire?

MR. MCWILLIAMS: To show he doesn't have the proper prerequisite for knowing the defendant's truth and veracity. He is going to proffer.

He is a defense witness, right?

MR. MINKUS: Right.

THE COURT: All right. Ask Capt. Peters to come in, please.

THE CLERK: Should he be sworn for this?

THE COURT: Yes.

MR. MCWILLIAMS: Would you swear him for the purpose of voir dire.

(Thereupon, the witness was sworn.)

VOIR DIRE EXAMINATION

By MR. MCWILLIAMS:

Q. Please state your name.

A. Ronald L. Peters.

Q. Prior to April 14th, how long did you know Gary Maness?

A. Approximately two months.

Q. During that time, were you personally familiar with the defendant's reputation for truth and veracity in the military community?

A. What do you mean by "personally"? Are you talking about individual contact or are you talking about me in my position?

Q. In other words, were you familiar with what his reputation in the community was, not your own personal feeling, but his reputation in the community, as to truth and veracity?

A. As far as the civilian community, I'd say no.

Q. As far as the military community?

A. As far as the military community, I never had any problem with Gary.

Q. Would your testimony be——

THE COURT: Did you know his reputation for truth and veracity in the community in which he lived and worked?

Did you know what his general reputation was?

THE WITNESS: Within the community of which he worked, I'd have to say yes; within the community in which he lived, I'd have to say I don't know.

Q. (By Mr. McWilliams) Let me ask you this: Do you understand the difference between reputation for truth and veracity and reputation for keeping out of trouble?

A. Well, differentiate them.

Q. All right.

Did you ever hear anybody ever discuss whether or not Gary Maness was truthful in the community?

A. I never heard anybody say anything contrary to that.

Q. Did you ever hear anybody discuss his reputation for truth and veracity?

A. No.

Q. Basically, are you basing your opinion on the fact that he didn't give you or your superiors any trouble?

A. Subordinates.

Q. Your subordinates any trouble?

A. Basically, yes.

Q. Isn't it a fact that that really doesn't have anything to do with his reputation for truth and veracity, but, rather, for obeying orders in the military community and keeping himself out of trouble?

A. Yes.

Q. But that has nothing to do with whether he tells the truth or lies in his community, isn't that a fact?

A. Basically, yes.

MR. MCWILLIAMS: Move to strike his testimony.

It's reputation for aggressiveness or lack of it; not truth and veracity.

MR. MINKUS: This is his commanding officer. He would know the reputation that his fellow officers held, with respect to truth and veracity.

THE COURT: He just said he didn't.

THE WITNESSS Well, he was asking me, basically, in the community in which he lived.

Like I say, Gary, when he worked for me and for my immediate subordinates who are in turn his immediate

service superiors, I never heard anything against him or he was never brought to me for any disciplinary reprimand type action. He is good, as far as a soldier. He did his job as good as any other soldier working for me now.

MR. MCWILLIAMS: That's not the proper test.

CROSS EXAMINATION

By MR. MINKUS:

Q. Did you know his reputation in the area for truth?

A. Well, if he had lied, you know, to his superiors, he would have basically got himself in trouble.

Q. How about to his fellow soldiers?

A. If he lied to them, he would have eventually got himself in trouble.

Q. Do you know his reputation for truth and veracity among his fellow soldiers?

A. Correct.

MR. MCWILLIAMS: Is your only basis for that the fact that he never got in trouble, to your knowledge, with his superiors or other people of the military community?

THE COURT: You are going back and forth. He's answered it two or three times.

MR. MINKUS: Well, isn't it a part——

THE COURT: I am going to let him testify.

Overruled.

All right, what else do you have, other than the captain?

MR. MINKUS: I have his mother and his father.

THE COURT: For character?

MR. MINKUS: Yes.

THE COURT: Just the question: Do they know his reputation in the community, right?

MR. MINKUS: Yes.

THE COURT: We are not going to get into a——

MR. MCWILLIAMS: I have a right to voir dire them, because we are talking about a particular community and they were not down in this particular community until after the death, Judge.

And during the times of the domestic situation, they were not down here and had no knowledge of the reputation at that time.

THE COURT: I am going to let his mother and father testify that they think he is a nice boy.

MR. MCWILLIAMS: All right.
THE COURT: All right. Who do you want first?
MR. MINKUS: Capt. Peters.
THE COURT: Okay. Bring the jury in.
I expect this to be limited to just those questions, however.
(Thereupon, at 9:05 o'clock p.m., the jury returned to the courtroom.)
THE COURT: State and defense concede the presence of the jury, note the presence of the defendant and counsel in the courtroom, and waive polling?
MR. MCWILLIAMS: Yes, Judge.
MR. MINKUS: Yes.
THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)

Thereupon——

CAPT. RONALD L. PETERS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Would you please state your name.
A. Ronald L. Peters.
Q. What's your address, Mr. Peters?
A. Home address?
Q. Yes.
A. 10510 Southwest 203rd Terrace, Miami.
Q. Are you a soldier in the Army?
A. Yes, I am.
Q. What is your rank?
A. Captain.
Q. Where are you stationed at this time?
A. Battery "A," Second Battalion, 52nd, Army.
Q. Are you the commanding officer of one Gary R. Maness?
A. Yes, I am.
Q. Do you have an opinion with regard to the truth and veracity of the—— Strike that.

Do you have an opinion with regard to the manner in which his fellow—the community—holds him in, with respect to truth and veracity?
A. Yes, I do.

MR. MCWILLIAMS: I object to the form of that question, Judge.

THE COURT: Do you know the defendant's reputation for truth and veracity in the community in which he is working?
THE WITNESS: Yes, your Honor.
Q. (By Mr. Minkus) And——
THE COURT: Is that reputation good or bad?
THE WITNESS: That reputation is good.
THE COURT: Next question.

Q. (By Mr. Minkus) Do you know——
MR. MINKUS: I have no other questions.
THE COURT: State?

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. Did the defendant ever discuss his problems with you?
A. No, he didn't.
MR. MCWILLIAMS: No further questions.
THE COURT: Next witness.

MR. MINKUS: Would you please call Mrs. Ruth Maness?
THE COURT: Captain, would you ask Mrs. Ruth Maness to come in, as you go out?
THE WITNESS: Yes, ma'am.
THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)

Thereupon——

RUTH MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Would you please state your name and address, ma'am.

A. Ruth Maness, 2802 Victor Street, St. Louis, Missouri.
Q. What is your relation to the defendant?
A. His mother.
Q. Do you know of your own knowledge the reputation of Gary R. Maness for truth and veracity in the community in St. Louis, Missouri?
A. Yes.
Q. What is his reputation?
A. He was good. He never lied to me in his life.
Q. Was he ever in trouble?

MR MCWILLIAMS: Objection. That's not proper.
THE COURT: Yes. Sustained.
MR. MINKUS: I have no other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. Were you in Miami when Gary Maness and his wife, Linda Maness, were living here with Misty?
A. Yes. I come April 17th. I think it was on the 17th.
Q. This was after the baby had been admitted into the hospital, is that correct?
A. Yes.
Q. My question is: Were you down here and familiar with your son's domestic situation between March 10th and April 14th, when the baby first went to the hospital?
A. No. I hadn't been to Florida until I come April 17th.
Q. So then, you were not familiar with whatever was going on down here in Miami at that time, isn't that correct?
A. Yes.

MR MCWILLIAMS: I have no further questions.
THE COURT: Who do you want next?
MR MINKUS: The father, Ora Maness.
Would you send in Ora Maness.
THE COURT: Would you ask your husband to come in, please.
THE CLERK: Raise your right hand, please.

(Thereupon, the witness was sworn.)

Thereupon——

ORA MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. MINKUS:

Q. Would you please state your name and address for the record.
A. Ora Maness, 2802 Victor, St. Louis, Missouri.
Q. What relation are you to the defendant?
A. His father.
Q. And you, of your own knowledge, know the defendant's reputation in the community of St. Louis, Missouri, for truth and veracity?
A. Yes, I do.
Q. What is that reputation?
A. Good, very good.
Q. He is a truthful and honest person?
A. Yes.
Q. Does he lie?

MR MCWILLIAMS: Objection.
THE COURT: Yes. Sustained.

MR. MINKUS: I have no other questions.

CROSS EXAMINATION

By MR. MCWILLIAMS:

Q. Mr. Maness, you weren't in Miami between March 10th and April 14th, were you?
A. March 10th and April 14th?
Q. When Linda Maness and Misty came to live with Gary in Miami?
A. No.
Q. You weren't personally familiar with whatever was going on in Miami, were you, sir?
A. No.

MR. MCWILLIAMS: I don't have any further questions.
THE COURT: All right.
MR. MINKUS: Defense rests.
THE COURT: All right.
Wait outside, please, sir.
Motions with or without——
Oh, excuse me.
Does the State have rebuttal?
Defense has just announced it's rested.

MR. MCWILLIAMS: Are we going to continue in the morning?

THE COURT: I'd like an answer to my question, first.

MR. MCWILLIAMS: Yes. I have one, but I sent her home.

THE COURT: Oh, that pretty well answers the second question, doesn't it?

MR. MCWILLIAMS: I would anticipate that witness would take no more than five minutes, about.

THE COURT: How far is home?

MR. MCWILLIAMS: Perrine.

THE COURT: Mrs. Kelly?

MR. MCWILLIAMS: No; Sherry Bliffert.

THE COURT: Why would you send her home?

Well, all right. From the looks of tomorrow's calendar, I know we have approximately 30-some cases that are set for trial. We'll have to work our way through the calendar. I don't see any way that we can get back into this case before 11 o'clock.

I am not even sure about that. That's the closest I can come.

All right.

Ladies and gentlemen of the jury, during the time that we are in recess from this particular trial, you will be permitted to go about your own separate ways.

Do not discuss this case among yourselves or with any other persons. Don't talk it over with your families when you get home.

If there's anything in the newspaper, on the radio or on television about this case, never read nor listen to nor watch anything that pertains to this case. Don't permit anyone to discuss the case in your presence.

If anyone tries to, tell them you are on the jury and ask them to stop talking about it, immediately.

If they persist, report it to the Court when you return.

Do not visit any scenes that you might have heard testimony about today.

When you come in tomorrow morning, come straight to this courtroom.

Now, there will probably be large crowds of people. Just work your way through them and go straight into your jury room. Don't wait in the areaway here, you know, where the people are seated now. Don't wait out in the hallway. Don't report back to the jury room that you were

in today. Come in at 11 o'clock and go, right, straight into that jury room and stay there until we can get to you.

Now, I realize that I am setting it for 11 and I am hoping that I will be able to get to it.

We'll do our very best, but, as you know from your service just today, we have a few cases and will get with you just as fast as we can.

Are there any special admonitions from either State or defense?

MR. MCWILLIAMS: No, your Honor.

THE COURT: Here's the information.

All right. This case is recessed until 11 tomorrow morning. Court is recessed until 9 tomorrow morning.

(Thereupon, at 9:15 o'clock p.m., the jury left the courtroom.)

(Thereupon, the trial was adjourned to Tuesday, October 5, 1971, at 12:10 o'clock p.m.)

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
—vs—
GARY MANESS,
Defendant.
} NO. 71-4452

The trial of the above-entitled case resumed before the Hon. Ellen J. Morphonios, Judge of the above-styled court, and a jury, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Tuesday, October 5, 1971, at 12:10 o'clock p.m.

APPEARANCES:

TERRENCE J. McWILLIAMS,
Assistant State Attorney,
on behalf of the State of Florida.

CARL MINKUS, Esq.,
on behalf of the Defendant.

THE COURT: Counsel, either of you have any special charges?

MR. McWILLIAMS: I have one. It's a standard one. I'm asking for a charge on accomplice. I'm asking for 2.04, accomplice. If you will look at it, you will see it's appropriate.

THE COURT: Accomplice?

MR. McWILLIAMS: Yes.

THE COURT: No, it's principals, 2.04. Principals.

Inasmuch as the defendant is charged, and the only one charged, I'm denying the request for a charge on principals, unless you want it.

MR. MINKUS: No.

Judge, I'm asking you to charge the jury concerning circumstantial evidence.

THE COURT: I've already got it marked.

Is that the only special?

MR. MINKUS: Yes.

THE COURT: Everybody ready for the jury?

MR. McWILLIAMS: Yes, your Honor.

My witness is in the courtroom. I don't see any sense in sending her out and bringing her back in again.

THE COURT: It's my intention to go right straight through. And then, after they retire, we will send down for something for them to eat in there, then take a brief break, and I'll start picking another jury on another case.

Bring the jury in.

(Thereupon, at 12:22 o'clock p.m., the jury returned to the courtroom.)

THE COURT: State and defense concede presence of the jury, presence of the defendant and counsel, waive polling?

MR. McWILLIAMS: State so concedes, your Honor.

MR. MINKUS: Defendant, likewise.

THE COURT: All right, proceed.

MR. McWILLIAMS: State would call as its rebuttal witness Sherry Blifford.

Swear the witness.

(Thereupon, the witness was sworn.)

Thereupon——

SHERRY BLIFFORD

was called as a witness by the State of Florida and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. McWILLIAMS:

Q. Would you please state your name.
A. Sherry Blifford.
Q. Do you know the defendant in this case, Gary Maness?
A. Yes, I do.
Q. Do you see him in the courtroom?
A. Yes, I do.
Q. Would you point to him, please.
A. (Indicating.)

MR. McWILLIAMS: Indicating the defendant.

Q. (By Mr. McWilliams) How do you know Gary Maness?
A. He used to come into the place where I worked as a waitress. He came in there to eat.
Q. Where was that? Where did you work?
A. In Homestead.

Q. Homestead?
A. Yes.
Q. About how many times did you see him come in?
A. He used to come in every night with his friend, just about every night.
Q. All right. Did you ever have a discussion with Gary Maness concerning his marriage?
A. Yes, I did.
Q. Do you remember approximately when that was?
A. It was before his wife had come down to live with him, probably the beginning of March.
Q. This year, 1971?
A. Yes, it was this year.
Q. Where was that conversation?
A. It was inside the restaurant.
Q. Inside the A & W Restaurant in Homestead?
A. Yes.
Q. What did he say and what did you say concerning his marriage?
A. Well, just, first, small talk. He asked me if I was married. I said yes. I said, "Are you?"
All he said was, "That was a mistake."
Q. Why did he say it was a mistake?
A. He didn't say.
I said, "Are you married?"
He didn't say yes or no. He just said, "That was a mistake."
I said, "What?"
He didn't say.
Q. Did you have any other conversation with him concerning his marriage?
A. Well, I said, "I'm married, very happy. Aren't you?"
He said, "You'll be sorry." That's all he said.
I had to go out.

MR. MCWILLIAMS: You may inquire.
MR. MINKUS: I have no questions.
MR. MCWILLIAMS: I have nothing further, your Honor.

THE COURT: Both sides rest?
MR. MCWILLIAMS: Yes, your Honor.
MR. MINKUS: Yes.
MR. MCWILLIAMS: You may be excused.

(Witness excused.)

THE COURT: All right, proceed. Proceed with closing argument.
MR. MCWILLIAMS: Yes, your Honor. Ready at this time.
MR. MINKUS: Judge, may I bring in the mother and father?
THE COURT: Yes. The Rule is relaxed. If there's anybody out there, you can bring them in. Whoever wants to come in, can come in. The Rule is relaxed at this time.
MR. MCWILLIAMS: May I proceed, your Honor?
THE COURT: Proceed.

MR. MCWILLIAMS: May it please the Court:

Ladies and gentlemen of the jury, this is closing statement. What I say is not evidence. I merely summarize to you what I think the evidence has shown. Your recollection, and your recollection alone, is the only determining factor of what was said on the witness stand.

Collectively, the six of you who will retire to deliberate will remember what was said. I will only tell you what I remember and what I think the State's case has shown.

Now, I will briefly, very briefly, go over some of the important points of the State's witnesses' testimony to show you how they dovetail, how they all fit together like pieces of a puzzle, to give you a complete story, to give you the whole truth, which is, basically, what we are after here. That is the prime purpose, to determine the whole truth.

If you will remember Dr. Kahn, he was the medical examiner. Now, we have alleged that the defendant caused the death of Misty Maness by blows to the head. Well, Dr. Kahn, the medical examiner, testified that he conducted a post-mortem examination and, in fact, the cause of death was multiple blows to the head, not one, not two, but a combination of several blows to the head.

He also testified in his examination about the broken right leg. And I asked him, "Would you please show the jury approximately where the break was in the leg."

Now, you will see why in a few minutes. I'm sure you already have.

Then, if you remember, he pointed and said the break was in this area here. He pointed right around the right knee. That is very important. He also testified on cross-examination when Mr. Minkus asked him, "Well, Doctor, you don't know what caused the break in the left arm, do you?"

And Dr. Kahn said, "Well, all I can say, it was a spiral break."

He said all he could tell from that. Remember, he is a professional medical examiner.

He said, "All I can tell, this is consistent with jerking or tugging the arm." That's important too.

Now, this man is an expert witness. And in considering his testimony, you have to take into consideration the weight to give an expert witness.

Those two things, the nature and location of those two prior fractures is very important for these are pieces of the puzzle to the whole truth.

Dr. Sturge, he's the one, the military doctor that came in with the little radio on his uniform. He was the first one that observed the defendant, Gary Maness, and his wife and the child down at Homestead Air Force Base. And the first thing he said, he noticed when they brought the baby in, and he noticed the severe injuries. He also noticed something else. He noticed the wife was upset, visibly shaken. And he noticed Gary Maness was cold, unemotional, unconcerned. Again, putting one of the pieces of the puzzle together.

In other words, he was telling you that he appeared, while this baby was fighting for its life, in the same cold, unemotional state that he testified before you.

He also testified to a very important thing. He said he told Gary, "Please, I'm trying to save your baby's life. Tell me the truth, please."

What did Gary tell him? The baby hit its head with a bottle, fell down in the crib.

Remember, you are to consider and weigh how much credibility to give his testimony. Can you believe the man? Can you believe that he'd come here and tell you the truth when his baby is lying there, dying, and the doctor is begging and pleading, and he won't tell the doctor the truth. He lies to him. Can you believe his testimony?

Dr. Fogel is the professor, the one that teaches pediatrics, another expert witness. He continued to explain to you the whole puzzle, how everything fits together. He testified early and gave you the background of what the battered child syndrome is. And, as the rest of his testimony progressed, I am confident that each one of the things that he found in this type of case fell into each piece of the puzzle and completed it to make a whole.

Let's look at the pieces. First, the different elements of the battered child syndrome which he testified to when he diagnosed the child. That's what it was. He was positive of it.

Now, he says, normally, when you have a battered child syndrome, you look into the history to find prior violent acts or some acts to cause a family background or whatever underlying facts there are which would trigger these things. You look for prior violent acts.

So, he started looking for old fractures.

Again, we know from the doctor, his most important testimony, there was a fracture to the right leg and a fracture, a spiral fracture, to the left arm.

Now, if we look at the testimony of all of the witnesses, I am confident that you can see how the old fractures got there.

The right leg. The right leg, well, now. Linda Maness said that this defendant, Gary Maness, in the car one time, slapped Misty on the right leg so hard that it left a red mark. And when you read the confession, and I'm sure you will want to read every single, solitary word of that confession, you will see where this defendant admits in his confession that he slapped Misty Maness on the right leg in the car.

Her statement, his confession and the medical testimony all corroborate it. This was within six weeks when they first moved down to live with him, that this child sustained the fracture in its right leg.

I'm confident that you know how it got there. Gary Maness broke that child's right leg. And if you look at the other old fracture, not very old, the left arm, the spiral fracture, that's consistent with jerking.

The registered nurse that lived upstairs, Caroline Kelly, who has no interest, no reason to come here and tell you anything but the truth, no motive, a disinterested witness, she came here and told you that she saw this defendant jerk that child by its left arm, hard. You heard the testimony.

He admits in his statement that he slid the child across the seat in the car. But, of course, since he knew it was the left arm, he said in his statement it was the right arm. But we know it was the left arm, by a jerking or tugging of the child's arm.

If you remember, I asked him on cross-examination,

"Isn't it a fact you first noticed that she started to favor her arm after you jerked her arm?"

He said, "Yes." That was about a week after when he noticed that she started favoring that arm.

So, Dr. Fogel's testimony about the battered child syndrome and violent acts is corroborated by his medical testimony, by his confession, by the statements of the other witnesses.

Prior violence. Linda also testified that very same morning, because the child was crying——that's an important factor, crying——the child was crying on the way to pay the bill at the TV store, and he slapped her twice in the face just because the child was crying.

Prior acts of violence. The puppy. The puppy dashed against the floor, a week-old puppy. Why? Linda testified it was because the puppy was crying. Well, whining.

You know, when a small puppy or baby or infant cries, basically, it's a call for help, a call for you to respond to their call, for you to answer to your responsibility. That's what a baby cries for. He wants help.

Madeline Keith, she's a very important witness, and her testimony carries such great weight because she is the most totally disinterested witness in this case that you can ever want to find. How long had she known the defendant? For half an hour. She doesn't know the family, she doesn't know the other State's witnesses, she doesn't know anybody here. She meets the defendant and the baby for half an hour. What did she tell you? She told you that she saw in the car a child was hurt. She described it wasn't moving. Its face was black and blue, and the defendant was laughing.

Big joke. The baby lost the battle. The baby lost the battle, that's true, but it's not funny.

She has no interest other than telling you the truth, the most important thing, other than the fact that there were, again, bruises on the cheek. Prior acts of violence. The most important thing is why. Why?

Gary Maness told her, "I don't want the responsibility. I don't want any part of marriage. I don't want any part of them."

What did she have to gain by saying these things? All we want is the truth, and she has no interest in this case, whatsoever.

The Judge will tell you that one of the things that you

use to test the credibility of a witness is their interest. She doesn't have any.

Now, if you look at the whole picture, and it fits in with Dr. Fogel's analysis of the battered child syndrome, you will see the trigger response. Here's the defendant that is married. His wife——well, she's pregnant. He does not want the responsibility. You can see this by the statements he made to the last witness, Sherry Blifford, who testified that he said, "It's a mistake. You'll be sorry." And by the statements he made to Madeline Keith, the most disinterested witness. He does not want the responsibility. He felt tied down. He felt it was a mistake. What is he going to blame it on and what is the reason why he is in this position, being married? The child.

What is the constant thing, from the testimony, that calls his attention to his responsibility, that calls his attention to the need to be a father, to accept the responsibility as a husband, as a father? The child cries, asks for help, asks to respond to responsibility. That is the one thing in every single, solitary instance of violence that triggered this defendant to his acts of violence. The crying, crying for help, for the responsibility that he totally rejected.

Sgt. Frank, in weighing his testimony, you will want to remember that he has been with the police department for 10 years. He has been with Homicide, the most professional part of the police department, for five years, and he is truly a professional man.

Again, the Judge will tell you when you evaluate the testimony of the witnesses, you're supposed to study the candor, the way they testify, the means of knowing what they testify to, their appearance before you.

He showed no hate, no revenge. He just testified just like it was.

Now, one of the things that you will see, and I'm sure you will want to read the confession and his rights, and everything you can see from his very careful consideration of the defendant's rights. How many times did he warn him, get him to initial, get him to sign, dictate to a stenographer. You can see by his extreme caution that this defendant's rights, that this is a very fair and impartial man. He is a true professional.

And you will want to read those statements. You want to contrast that with the image that Mr. Minkus tried to

produce for you. Look at the statement. Is that the way the witness appeared before you? No, he was a professional. He had a stenographer there. Why? Because he is a professional. Because he was anticipating questions of the defendant. Didn't he say that? It's all in the record. You can read everything that was said. All the facts are in that confession. And counsel wants you to disbelieve the confession.

Now, consider two things when considering the confession. You can't just consider it all by itself. You must consider it in conjunction with all the testimony. You will see when you read the confession that it corroborates every single, solitary substantial fact testified to by the disinterested witnesses, every single fact is corroborated by his confession.

Let's look at some of the facts he testified to and some of the facts in the confession.

Blows to the head. Well, in the confession, Detective Frank asked him, "Do you know what caused the death?" He said, "Yes, I know what caused the death."

And about that, he goes on to describe how he struck poor Misty in the face, blows to the head. The bit about going to the store. Linda testified she went to the store for about 10 or 15 minutes. And, again, the defendant is not supposed to have rehearsed this thing. A one-minute phone call. But he testified in the confession. It's under oath. It's sworn to. That Linda went to the store for possibly 15 minutes. And it was during those 15 minutes that he lost his cool when the baby started crying and slapped the child, slapped it in the jaw. That corroborates every other witness.

The prior acts. We know from the testimony it's the crying that triggers this defendant to respond to his responsibilities in such fashion. And in his confession, what does he say? "The baby was crying, so I lost my cool. I went and I slapped it twice in the jaw." He slapped it once forehand and once backhand. You know, from your common sense, that means once on the right side and once on the left side.

However, it was corroborated by physical testimony. I'm sure that you will look at the photos. And you will see one bruise to the right cheek, one bruise to the left cheek. Every single, solitary thing he says in his confession is corroborated by disinterested, outside evidence. That shows you the truth of the statements contained in the confession.

You will also see from the testimony of the other witnesses that he slapped Misty in the right leg where, you know, it was broken. The confession says that he slapped Misty in the right leg. When he testified under oath here, he denied that. But, he denied under oath in the confession, too. The reason given to you for rejecting this confession is garbage. That's Gary's garbage.

Look at it. He was advised. You can read it, you can see it. Use your common sense.

At that time, the charge was second degree murder. So, Detective Frank says, "Now, Gary, I want to warn you, the penalty for this carries from 20 years to life."

At that time, that was the charge before the preliminary hearing. So, he has a one-minute phone call. Now, remember, also, that the detective says, "I know you did it. You're under arrest."

So, he says he's going to confess to save his wife, who is not in jail, who is not a suspect. The detective tells him, "I know you did it." Wouldn't it seem, if he was going to do that, if the detective was going to do that, wouldn't it be common sense to say, "Well, Gary, I think your wife did it. I'm going to put her in jail, not you. I'm sure she did it. And the only way you can convince me she didn't do it is by you telling me you did it."

That's not even what he said. He said, the detective said, "I know you did it. You're under arrest. You're charged with murder. So, help your wife out. Keep her out of jail." Absolutely unbelievable, incredible. It's garbage.

Again, you have to weigh the testimony of this man against a professional detective. How can you believe a man that's going to lie while his child is dying, struggling for life with the doctors? How can you believe him now? How can you believe him when he gives one statement under oath, a confession, turns around and gives another statement under oath here. You heard how many times he contradicted himself under oath on cross-examination? How can you believe him? How can you believe a man that says that every single, solitary witness of the State lied.

Well, marriage. He lied when he said he was unconcerned. Mrs. Keith was lying when she said he didn't want the

responsibility. He said they all lied. Do you believe his testimony?

Briefly, we will go over the defendant's witnesses. His mother and father testified. Of course, they are good people. Of course, they testified that back in——wherever the defendant lives, he has a good reputation. But, they weren't down here during the marital difficulties, that the poor baby never got hurt until she came here and lived with Gary. So, they really don't know what happened down here during those months. And Capt. Peters, he testified that the defendant has a good reputation for truth.

But he never discussed his domestic problems. A good reputation for truth. You've got one statement in a confession and another statement under oath. Inconsistent, the likes of which you will see. But, he has a good reputation for truth.

Linda Maness. We admit to you Linda Maness is no, she's no prime wife, she's no prime mother. We will admit that the evidence shows that she is pretty neglectful in her ways. The fact is she is guilty of some misconduct. But that does not take away from the fact that he caused the death of the child, and that he is the one who is charged, who caused the death.

I didn't put her on as my witness. I don't condone her acts. She should have left a long time ago. Maybe she didn't love the baby enough, maybe she loved this defendant too much, but you can also test her credibility. You remember there were tears streaming down her face. And use your own common sense. Isn't that a sign that the witness is telling the truth. She was crying when she was testifying how he would lose his temper, how he became a different man. And she testified she never struck the baby. Which ruled out every possible, every reasonable hypothesis of innocence which had already been ruled out before. She was guilty of misconduct.

The fact she didn't take the baby with her when the defendant told her, "I don't want you. Get out of the State. Take the baby with you." She should have gone. Maybe her failure to do that eventually resulted in the death.

But you know from the testimony and the evidence, the sole factor that caused the death was the blows to the head struck by this defendant.

The Judge will tell you you can't look outside of the

evidence to guess or conjecture what may have been testified to or what may have happened. You know from the evidence there is absolutely no evidence whatsoever that Linda Maness ever touched that child on the head. But the evidence abounds that this defendant struck that child in the head several times and laughed about it like it was a game. The baby lost a fight.

One other thing, is contrasting the demeanor of the witnesses as they testified before you.

Linda cried. She felt it. She was emotional like when she was in the hospital. He was cold and calculated and unfeeling, unresponsive, just as he was at the hospital when the doctors were begging for help.

I feel confident after you have heard all the instructions you will have no alternative but to find this defendant guilty as charged of culpable negligence of manslaughter of Misty Maness.

Thank you.

MR. MINKUS: Ladies and gentlemen of the jury:

You have heard the evidence here and it's my belief the only piece of evidence that you have that this defendant ever struck this child in the head was his statement that he gave to the police officers in which he said, "I put her in bed, rocked her bed. I guess I just lost my cool like you said, and I slapped her twice."

Why did he make that statement to the police? I believe I know why. You see, one year ago, I lost my child, also.

MR. MCWILLIAMS: Objection. Extremely irrelevant. It's not proper.

THE COURT: Sustained.

MR. MINKUS: Let's review the facts in this particular case. The defendant is in the Army with a good record.

March 12, his wife comes down from Texas with the baby. He notices bruises. On March 28th, he notices bruises on the baby's face. He asks his wife, "Linda, how did this happen?" "She got it by hitting her head in the crib on a bottle."

What does he do? He borrows a friend's car, takes the baby to the Base Hospital. The doctor says, "Return the next day." He does return the next day with the baby. The doctor says, "Oh, there's just a bruise. It will get worse

before it will get better." On the way back from the hospital, the baby is crying. And the wife goes ahead and strikes the baby on the leg. And he says, "Linda, don't do that." And Linda says, "I can do whatever I want. That's my baby."

Then, we come to the part about the arm. The mother says, "Oh, I never noticed anything wrong with the baby's arm." The little baby. "I never noticed anything wrong with it. Oh, yes, I know she was favoring it a little bit, because, as Gary said, he came home and I looked and I saw that the baby wasn't using its arm. He went and he asked me what I could do, what he should do. He says it's not a bruise."

But he was concerned. He borrowed a friend's car and they took the baby to the hospital to see about it, to see about the baby's arm.

That brings us up to April 14th, 1971, the date in question.

What does Gary testify to and what does Linda testify to? Gary got up at 5:30 in the morning and he went to work. Linda got up at about 9:30. There were bruises on the baby's face.

"Linda, how did the baby get those bruises," we asked her on the stand here. "I don't know. They were just there."

"Were you with the baby all day the day before and all night?"

"Yes, I was with the baby all those days, but I don't know how they got there."

Just as she doesn't know how the baby got the broken arm, just as she doesn't know how the baby got the broken leg, and just as if she wasn't aware about those bruises and those fractures to take the child to a doctor.

What happened? After Gary went to work, got off work early, went down to the bank to cash a check, that he went to a pawnshop to purchase a teargas pistol for his wife. Comes home and he sees the bruises on the baby's face.

"Linda, how did the baby get those bruises on her face?"

"I don't know."

What does he do then? He takes ice and puts it on the baby's face. Subsequently, the baby is given a bottle. He had something to eat and subsequently they take the baby and the three of them walk down to the store.

Gary says he never struck the baby in the face, never.

What happens then? They come back home. And, incidentally, Linda says that these bruises existed on the baby's face before Gary Maness ever came home. They were there in the morning when she woke up, but she has no idea how they got there. Yet, she lives with this baby the whole time.

They come home from the store, sit down, give the baby a bottle. This is about 12 o'clock in the afternoon. They give the little baby a bottle. She's in the bed. Gary is watching television, making a little something to eat. They sit down and start talking.

"Linda, let's have another baby." Why does he want another baby? Because he'll be getting out of the armed services shortly. This is the way that he could take care of his medical expenses of having a baby.

What does Linda say? "I don't want to have a baby." Subsequently, he thinks maybe she's afraid, physically, to have a baby. "Well, let's adopt a baby."

What happens then? This little conversation degenerates into an argument.

Gary, as you could see, being a very quiet individual without a temper, goes outside with a gun, into his little backyard by his house and he fires the gun. This is about 2 o'clock in the afternoon. He's out of the house about 2, 2:30. And suddenly, Linda comes out. She says, "I'm sorry, Gary. We really shouldn't have argued again because I think I'm pregnant."

That makes Gary feel good. In a few minutes, he comes back into the house. "Honey, I'll make something to eat. You go ahead and look at the baby."

He goes in to make something to eat and she goes in to look at the baby. She calls him, "Gary, come here." Gary goes to the bedroom. He sees that the baby's eyes are dilated, rolled back in its head, bruises on its face, in a comatose state.

He says, "Get the nurse upstairs." She goes up. She gets Mrs. Kelly. Mrs. Kelly comes down. Cary puts a wet rag on the baby's face. Mrs. Kelly says, "You better take the baby to the hospital or to a doctor."

He calls his friend, Sgt. Mortimer, who brings his car.

Now, the doctor at the Base Hospital didn't testify that Gary was laughing. He testified that he appeared to be in a state of shock, didn't understand the seriousness of what

was going on. He asked how the baby got these bruises, rather, the doctor at Jackson asked how did the baby get these bruises. And the only answer that he knew was, "What?" It was from Linda Maness, who said the baby hit herself on the bottle in the bed. He never saw the baby hit her face with the bottle or hit her head in the crib. He only knows from what his wife tells him.

The doctors tell him that it's very serious. He goes out. Subsequently, there is some talk about them, about what happened to the child. More or less, there are stories at that time. Counsel asked what happened. We don't know what happened to the baby. The baby hit itself with the bottle in the crib.

Then they had a conversation and then they leave and the conversation takes place between the two of them.

Gary's version is that, "They are going to arrest us for beating up the baby. I'm afraid to go to jail. I'm pregnant." What does Gary say? Gary says, "Don't worry, Linda. I'll take care of everything. You tell them that you went to the store."

Subsequently, in a few days, the mother and father come down. What do they find? Gary's mother and father and her mother. They come and stay at the house while the child remains in a critical condition in the hospital. What do they find? Bloody baby clothes. "Gary, do you know how the blood got on the baby's clothes, got on the blanket?" He says, "No, I don't know. Linda, do you know?"

"Oh, yes, it was blood off the baby's face." She takes them and washes them rapidly. Then, subsequently, the baby dies.

What happens to a father when his baby dies? I want you to put yourselves in that position, in the position that Gary Maness was in.

I'm going to tell you what happens when a baby, your only child, dies. You feel like you're alive but dead. Like the whole world is just going to hell, and you feel guilty, too. Why do you feel guilty? Because you're here and the baby is gone. You know that's not the way it's supposed to be. You're supposed to die before your child.

And you have one sense of loss, the loss of immortality, because when we die, no matter what everybody says, the only thing that lives after us is our children. That's all there is left.

So what happened then? And the police officers who did say they suspected Linda Maness——

MR. MCWILLIAMS: Objection. That's not what the testimony was.

THE COURT: Sustained.

MR. MINKUS: They go over—as Sgt. Frank says, "We wanted to question both of them. So, we went to the home in Homestead, first. We took Linda Maness down to the station. We asked her some questions, and then she made a statement to us."

And, subsequently, what happened? "We went over and we brought her home and we brought Gary down to the station."

What transpired in the station? There he was, Gary Maness, sitting there, two detectives.

I don't fault the detectives because this is their job. "Gary, did you kill your child?" "No, sir, I didn't kill my child."

"Yes, you did, and we know how you did it. You struck her two times in the face."

"No, I didn't, sir."

"We know how the child broke its leg, how you struck it in the car."

"I didn't, sir."

Then Sgt. Frank goes right up to him, goes right over at his face, and he says, "You dirty son of a bitch, you make me sick. I wish you would get up and jump me so I could beat the shit out of you."

MR. MCWILLIAMS: Objection. There was no such testimony from the defendant.

MR. MINKUS: He testified to that.

THE COURT: Overruled. It's argument.

MR. MINKUS: And what happened then?

Then Sgt. Frank said, "I told my partner, 'You better talk to him. I'm sick of him.'" And his partner went over and said, "Do you ever go out at night? Because you better not. Do you know what I mean?" And Gary says, "Yes, I know what you mean."

Then Sgt. Frank says, "Well, he's not going to say anything more to us. He can go home now."

Then they said, "Do you want us to drive you home?"

He says, "No, I can walk."

Then he says to his partner, "We better drive him home because I'd hate to make out paperwork on him if he was killed."

They put him in the car. They drive him home. On the way home, Sgt. Frank asks the fateful question: "Do you love your wife?"

"Yes, I love my wife."

"Well, why don't you keep her out of jail? Make a statement for us."

They pull the car up to the house. "All right. You can get out. Think about what I told you."

Gary gets out and Gary was thinking. And what was Gary thinking about? His child had just died a few days ago. And he felt this loss of immortality. As if your arms and legs are chopped off. You want something to replace them. You want that child back. But everybody knows nobody comes back from the dead. But you have to have something similar, another child from the same woman.

Gary, he says to Linda, "What did you tell them?"

She says, "I told them what you told me at Jackson Memorial Hospital, that I went to the store, you were out with the baby. You were home with the baby. I went to the store for five or ten minutes."

"All right, honey, don't worry about it."

The next morning, approximately 12, 1 o'clock, Sgt. Frank comes over with his partner and says, "Gary, you're under arrest." They put the handcuffs on him. "You've been advised of your Constitutional rights." He places him in the car, and in the car, they drive down to the station. And he makes a comment, what's going to happen to him.

When they get him in the jail, then he tells him, "If you love your wife, you don't want her to go to the Dade County Jail. You know what kind of place that is for a woman." Gets him upstairs into his office and he says, "Gary, have you thought about what it will do to your wife?" He says, "Yes."

He says, "Well, what do you want to do?"

He says, "Well, could I talk to a lawyer, first?"

Sgt. Frank says, "Well, you talk to the lawyer, I won't see you again until we go to court." He wouldn't see him until they got to court, because any lawyer would not have

allowed him to make a statement. For what motive would he make a statement? Just out of generosity? What reason would there be? There is none. There is no mention that Sgt. Frank beat him. What possible motive would this man have to make a statement, any statement that he struck his child, that he slapped his child?

The only possible reason is to protect something. That something was his wife, his pregnant wife, his child. Just as Gary testified to here, so Sgt. Frank took down the statement.

Well, first, let's go back a little. He says, "Can I call my wife?" Yes. Sgt. Frank dials the number, gives him the phone and he talks to his wife.

He says, "Linda, I'm making a statement. I want you to call my mom and dad. Tell them I didn't do it, I'm doing it to protect you."

And Sgt. Frank says, "I didn't overhear the conversation."

Then the stenographer is called. There was no stenographer present before he made the statement. There was just a stenographer when he agreed to make a statement. And the stenographer came in and took down the statement.

"I guess I just lost my cool, like you said, and I slapped her twice."

Subsequently, he's taken to the jail, and a few minutes later the statement is brought over to him. He reads it and he signs it. I believe this man is one hundred percent innocent.

Mr. McWilliams: Objection to personal beliefs. They have no business in an argument.

The Court: Sustained.

Mr. Minkus: But, irrespective of that, what about this mother? "I don't know my baby had a fractured leg. I don't know my baby had a fractured arm. I don't know there were any bruises on her head. I just woke up and I found them there."

I believe there is a reasonable explanation and an alternative than what the prosecutor has said. And that reasonable explanation all revolves around the one piece of evidence that they had of blows to the head. That's the only evidence they have, of blows to the head, that reasonable explanation. He had to have a reason to make that state-

ment. He could not have been such a cold, hard person and make that statement after prolonged questioning unless he had a motive, too, and that motive was to protect his pregnant wife who deceived him because it had turned out that she wasn't pregnant, which she told him about a month later.

In this courtroom, everybody has their duty. My duty is to provide you with that picture that recalls what happened during those days and hours so that you could see what happened. We could not provide you with that little bit where the child was struck before it was taken to the hospital. Why? Because he wasn't there.

Now, the duty evolves upon you, and I believe that duty is to acquit Gary Maness.

Thank you.

MR. MCWILLIAMS: May it please the Court.

Now, if you believe the testimony of Gary Maness, let's weigh it against the testimony of the others. You've got Dr. Sturge and you've got Caroline Kelly. You've got Madeline Keith. To believe his testimony, you've got to believe that Caroline Kelly is lying. To believe his testimony, you've got to believe that Madeline Keith is lying. To believe his testimony, you've got to believe that Dr. Sturge is lying. To believe him, you've got to believe that Sherry Blifford is lying, the waitress in the Homestead restaurant. She's lying. He said he never made any statement about his dissatisfaction with marriage. If you believe him, Sgt. Frank is lying.

In order to believe his testimony, you have to reject testimony of every single disinterested, unconnected witness the State has presented.

You have to use your common sense and put together that the State has drawn all these people, unconnected, from various walks and professions of life, drawn them into a great big conspiracy to frame this defendant. I trust you will use your common sense.

Your duty is to judge the credibility of the witnesses.

Mr. Minkus asked you to believe that Linda didn't care at all for the child. But who was it that went over to get the registered nurse, that wanted the baby to go to the hospital? Linda Maness. She's the one that went and got the nurse. Gary Maness didn't do it. Linda Maness got the registered nurse.

Mr. Minkus wants you to believe that the bruises on the baby's forehead and all the bruises were there the day before that morning. That's not the testimony. The testimony was one small bruise on the forehead early that morning. Testimony also was that either Linda or Gary was with the child the day before. When Linda was not with her, this defendant was. But that one small blow on the forehead is not the cause of death. All of the blows, multiple blows to the face.

Defense wants you to believe that while Linda Maness was out at the store, a mysterious phantom came in and slapped the child on the right cheek, slapped the child on the left cheek, and caused the death.

His statement, again. Look at the care, the care, the absolute professional care that the detective took one hour later, and you will see it. You will look at it with your own eyes. He brings her back to make sure that everything is exactly as was taken down. You will see the corrections that Gary Maness made when he struck out certain words and wrote in his own hand to make sure that everything was correct. That's professional care a good detective gives. It shows you how fair and impartial he is.

Gary Maness says he is lying, along with every other witness the State brought. This confession corroborates every single, solitary element of the State's case independent of outside evidence. That confession is not circumstantial evidence. That confession is direct evidence leading only to this defendant's guilt, excluding every reasonable hypothesis of innocence. It's direct evidence pointing the finger at one person, Gary Maness, that confession sworn to under oath.

MR. MINKUS: I object to the use of the word "confession." It's a statement.

THE COURT: Overruled.

MR. MCWILLIAMS: It's signed by this defendant with his own hand, taken down in shorthand and certified to as correct and accurate. When did he make it? After the baby died.

You will recall during most of the testimony, sometime after the baby was injured, this defendant wound up going to the hospital, like the time he was laughing about the child

with bruises on its face. After it lost that battle, he was going to the hospital.

He's like a little boy that breaks a prized possession, then afterwards, he wants to make it better.

He's arrested. The baby dies, he's arrested for homicide of the child. All of a sudden, he volunteers, "Can I make it better if I confess? What will be the consequence if I confess?" The only time he offers any explanation is when he is finally faced with the damage he has done. That's the only time he answers his call. Then he later abdicates that responsibility. He has a responsibility to get up here and conform to "I promise to tell the truth and the whole truth and nothing but the truth." That is the oath upon which the basic foundation of justice rests in this courtroom, the ability to testify under oath, a sworn oath. You've got it here. You watched it. Can he live up to that responsibility? Can he be responsible for telling the truth under oath? You know that he can't.

There were many times that there was that call for responsibility. You can tell from the evidence that is what brought things to a head. What was this conversation about another child, the one thing that constantly reminded him of that lodestone around his neck, that thing that tied him down, that responsibility that he couldn't accept. It was Misty. And there was conversation about another child.

And the wife left the house. The baby started crying. He answered his responsibility of a parent by beating that child to death, once forehand, once backhand, beyond and to the exclusion of every reasonable doubt, excluding every reasonable hypothesis of innocence.

We admit to you Linda was a miserable mother. She should have got out of this a long time ago. But she was not. And the cause of that baby's death, it was the blows to the face. And you can see them. You heard the testimony. You heard his history of prior violence and fractures and how the child got them. Did you ever hear one shred of evidence that Linda Maness beat the child? No. She is not on trial. This defendant is. This defendant caused the death, and this defendant swore to it under oath.

The State has proved its case beyond and to the exclusion of every real and reasonable doubt. I feel confident that you will answer your call and responsibility of sworn jurors and find the defendant guilty.

THE COURT: Will you gentlemen look over these charges and hand it back.

Ladies and gentlemen of the jury:

You have listened carefully to the evidence and the argument of counsel. I now ask of you the same careful attention to the law, as determined by the Court, which you must apply to the facts as you find them from the evidence.

You alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by the Court.

This defendant, Gary Maness, is charged that on the 14th day of April, 1971, in the County and State aforesaid, by his acts, procurement or culpable negligence did make an assault upon one Misty L. Maness with his hands and fists, thereby inflicting mortal wounds from which said mortal wounds she languished and died on April 18, 1971, a further and more particular description thereof being to the State Attorney unknown, in violation of Section 782.07 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Referring to Florida Statute 827.07. The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished.

Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the

intent to injure any person but with utter disregard for the safety of others.

The defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the information beyond and to the exclusion of every reasonable doubt before the defendant may be found guilty.

It is to the evidence, and to it alone, that you are to look for such proof.

The defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the information must be proved by the evidence to the exclusion of and beyond every reasonable doubt.

The presumption accompanies and abides with the defendant as to each and every material allegation in the information through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the information is not proved to the exclusion of and beyond every reasonable doubt, you must give him the benefit of the doubt and find him not guilty. But if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the material allegations of the charge have been proved, then you must find him guilty.

To overcome the presumption of innocence of the defendant and establish his guilt, it is not sufficient to furnish evidence merely tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare and weigh all the evidence, and if, after doing this, you think that your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the charge has been proved to the exclusion of and beyond a reasonable doubt, it is your duty to find the defendant guilty.

A doubt which is a mere possible doubt, a speculative, imaginary or forced doubt, is not a reasonable doubt. And, for the reason that everything relating to human affairs is

open to some doubt of this kind, such a doubt must not influence the jury to return a verdict of not guilty where they have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for such proof.

A doubt which is not suggested by, or does not arise from, the evidence or the lack of evidence, is not a reasonable doubt and should never be considered. In other words, you have no right to go outside the evidence for doubts of any kind. However, a lack of evidence or an insufficiency of evidence may create a reasonable doubt.

You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

You should reconcile any conflicts you find in the evidence without imputing untruthfulness to any witness. If you cannot reconcile any conflicts you find, then it is your duty to reject the evidence you find to be unworthy of belief and to accept and rely upon the evidence you find worthy of belief.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony, considered in the light of all the evidence in the case.

From these, and all other facts and circumstances in the evidence, you must reach your own independent conclusion, and in so doing, you should use the same common sense, sound judgment and reason you use in everyday life.

An expert witness is one who, by education, training or experience, has become expert in any art, science, profession, business or calling. An expert witness is permitted to give his opinion as to matters in which he is an expert, and may also state the reasons for his opinion.

You should consider each expert opinion received in evidence and give it the weight you think it deserves, and you may reject it entirely if you find that the alleged facts upon which it is based have not been proved or that the reasons given in support of the opinion are not sound.

Circumstantial evidence is legal evidence and a crime may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules: 1. The circumstances themselves must be proved beyond a reasonable doubt. 2. The circumstances must be consistent with guilt and inconsistent with innocence. 3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the defendant's guilt.

If the circumstances are susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are empanelled and sworn only to find a verdict based upon the law and the evidence. You are to lay aside any ideas that you may have about the wisdom or lack of wisdom of any particular law or procedure touching upon this case. You are to consider only the testimony which you have heard, along with the other evidence which has been received, and the law as given to you by the Court.

You are to lay aside any personal feeling you may have in favor of or against the State, or in favor of or against the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict.

You are not to be concerned with the imposition of any penalty in the event you reach a verdict of guilty. Just as the determination of the guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of the extent of punishment, within the limits prescribed by the law, rest solely with the Court.

When you have determined the guilt or innocence of the accused you have completely fulfilled your solemn obligation under your oaths.

Whatever verdict you render must be unanimous. The verdict must be the verdict of each juror as well as the jury as a whole.

This is the verdict form. It will read: The State of Florida versus Gary Maness. And it says: We, the jury, at Miami, Dade County, Florida, this 5th day of October A.D., 1971, find the defendant, Gary Maness—and there you will fill in after you select the foreman, the word guilty or the words not guilty.

You are here only to determine the guilt or innocence of the defendant. So, if the evidence convinces you beyond every reasonable doubt of the guilt of the defendant, you should find him guilty even though you may believe one or more persons are also guilty.

The defendant is not on trial for any act or conduct not charged in the information, and you must consider the evidence only as it relates to this charge.

Nothing I have said in these instructions or at any other time during the trial is any intimation whatever as to what verdict I think you should find. The verdict is the sole and exclusive duty and solemn responsibility of you, the jury, and neither the Court nor anyone else can help you in performing that duty.

It is your solemn obligation not to be swayed or influenced in any manner by any sympathy or prejudice you may have, either for or against the defendant, or for or against the State. In arriving at your verdict you must be guided solely by the evidence and these instructions, and you cannot let any outside influence enter into your deliberations on your verdict.

If, after having heard all the evidence and the law as given you by the Court, you have any reasonable doubt as to the defendant's guilt, you must find him not guilty. However, if you are satisfied beyond every reasonable doubt of his guilt, it is your duty to find him guilty.

If, while you are deliberating, you wish to examine more closely the exhibits which have been admitted into evidence, you may call for them and they will be delivered to you.

Your first duty upon retiring will be the election of a foreman to preside over your deliberations and sign your verdict when you have arrived at one.

If you wish to communicate with the Court during your deliberations, simply rap on your jury room door and someone will respond to your call.

The alternate juror may now be excused to return to the jury room with the rest of the jurors.

You may now retire to consider your verdict.

(Thereupon, at 1:33 o'clock p.m., the jury retired to consider their verdict.)

THE COURT: The Court will be in recess until 2:15 for everyone to get lunch.

(Thereupon, at 1:35 o'clock p.m., the jury asked for the statement of the defendant which was submitted to them by the Clerk of the Court.)

(At 3:10 o'clock p.m., the jury knocked on the jury room door and the Bailiff announced to the Court that they wanted the photographs. The photographs were thereupon delivered to them by the Bailiff.)

(Thereupon, at 3:30 o'clock p.m., the jury knocked on the door and announced they had a verdict.)

THE COURT: Gather everybody together in the Maness case.

Regardless of what this verdict may be, please, no reaction from any members of the audience.

State and defense ready?

MR. MCWILLIAMS: Yes, ma'am.

MR. MINKUS: Yes, your Honor.

(Thereupon, at 3:32 o'clock p.m., the jury returned to the courtroom.)

MR. MCWILLIAMS: State concedes presence of the jury and the defendant.

THE COURT: Ladies and gentlemen, have you reach a verdict?

THE FOREMAN: Yes, ma'am.

THE COURT: Hand it to the Clerk, please.

(Thereupon, the verdict form was handed to the Clerk, who, in turn, handed it to the Court.)

THE COURT: Publish the verdict.

THE CLERK (reading):

"In the Criminal Court of Record in and for Dade County, Florida. Case No. 71-4452. The State of Florida versus Gary Maness.

"Verdict: We, the jury, at Miami, Dade County, Florida, this 5th day of October A.D., 1971, find the defendant, Gary Maness, guilty. So say we, all. Joseph A. Mellerson, Foreman."

THE COURT: All right, ladies and gentlemen.
You want the jury polled, counsel?
MR. MINKUS: Yes, I do.
THE COURT: Poll the jury.

THE CLERK: Mary N. Jamal, is this your verdict?
MRS. JAMAL: Yes.

THE CLERK: Jeanne E. Hampton, is this your verdict?
MRS. HAMPTON: Yes.

THE CLERK: Caroline Jaffie, is this your verdict?
MRS. JAFFIE: Yes.

THE CLERK: Frostie M. Harden, is this your verdict?
MRS. HARDEN: Yes.

THE CLERK: Joseph A. Mellerson, is this your verdict?
MR. MELLERSON: Yes.

THE CLERK: Ralph McBride, Jr., is this your verdict?
MR. MCBRIDE: Yes.

THE CLERK: The jury has been polled and accede to the verdict.

THE COURT: Thank you for your services. You six will be permitted to go home and return tomorrow morning at 9:30 to the regular jury room where you had been before. 9:30 tomorrow morning in the jury room.

Thank you very much.

(Thereupon, at 3:35 o'clock p.m., the jury left the courtroom.)

THE COURT: Mr. Maness, step forward.

Anything anybody wants to say in mitigation or aggravation prior to passing of sentence?

MR. MINKUS: I just have to say that the defendant has, prior to this conviction, has had no difficulties in civilian life or in miltary life. He has an absolutely clean record. He

spent time in Germany and Vietnam. He went to Warren Holmes. He did not pass the lie detector test, but he testified under oath, anyway.

THE COURT: Anything anybody else wants to say?

Mr. Maness, you have been found guilty by a jury. The Court adjudges you guilty, sentences you to be confined to the State Prison for a period of 20 years.

You have been found and adjudicated guilty, and you have the right to appeal. You have the right to file an appeal within a period of 30 days. If you don't have funds with which to prosecute that appeal yourself, the Court will provide you the services of an attorney for that purpose.

All right. Issue the commitment.

MR. MANESS: Your Honor, would you appoint the Public Defender for this because I know he doesn't have funds.

THE COURT: He is insolvent?

MR. MINKUS: Yes.

THE COURT: Swear him for insolvency.

(Thereupon, the defendant was sworn for the services of the Public Defender.)

THE COURT: All right, the Public Defender is appointed for purposes of appeal.

Mr. Maness, this is Mr. Morgan. Mr. Morgan is with the Public Defender's office.

All right. Take him out.

(Thereupon, the trial was concluded.)

CERTIFICATE OF REPORTERS

STATE OF FLORIDA }
COUNTY OF DADE } ss.

We, NATHANIEL CORBIN and KATHERINE POPE, do hereby certify that the cause of State of Florida vs. Gary Maness, pending in the Criminal Court of Record in and for Dade County, Florida, Case No. 71-4452, came on for hearing before the Hon. Ellen J. Morphonios, as Judge, and a jury, on October 4 and 5, 1971; that we were authorized to and did report in shorthand the proceedings and evidence in said hearing; and that the foregoing pages, numbered from 2 to 162, inclusive, constitute a true and correct transcript of our shorthand report of the proceedings in said case.

IN WITNESS WHEREOF we have hereunto affixed our hands this 16th day of November, 1971.

NATHANIEL CORBIN

KATHERINE POPE

CONSTITUTIONAL RIGHTS WARNING:
INTERROGATION

BEFORE YOU ARE ASKED ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS.

(1) You have the right to remain silent. You need not talk to me or answer any questions if you do not wish to do so.

(2) Should you talk to me, anything which you say can and will be introduced into evidence in court against you.

(3) If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel.

(4) If you cannot afford an attorney and so desire, one will be provided without charge.

I HAVE READ THE ABOVE STATEMENT OF MY RIGHTS AND AM FULLY AWARE OF THE SAID RIGHTS.

I AM WILLING TO ANSWER ANY QUESTIONS ASKED OF ME.

I DO NOT DESIRE THE PRESENCE OF AN ATTORNEY AT THIS TIME.

THIS STATEMENT IS SIGNED OF MY OWN FREE WILL WITHOUT ANY THREATS OR PROMISES HAVING BEEN MADE TO ME.

GARY R. MANESS
Signature of Subject

April 26, 1971—4:20 p.m.
Date—Time

SGT. M. FRANK
Witness:

SGT. G. L. MINIUM
Witness:

PETITIONER'S STATEMENT TO POLICE

Case No. 58676-P April 26, 1971

Investigation into the Homicide of Misty Maness, W/F, 7 months, which occurred on or about 14 April 71, at 649 S.W. 1st Avenue, Homestead, Florida. The following statement was taken in the Public Safety Department building, 1320 N.W. 14 Street, Miami, Dade County, Florida, on Wednesday, 26 April 71, commencing at 4:30 p.m., in the presence of Sgt. M. Frank. Steno-Reporter S. Southern.

(Thereupon, the witness was duly sworn according to law.)

Q. (By Sgt. Frank) Would you please tell me your full name and age.

A. Gary Randall Maness, 21.

Q. Home address and phone number?

A. 649 S.W. 1st Avenue, Homestead, Florida. I don't know what the phone number is.

Q. Is it 248-3794?

A. Right.

Q. Where are you employed and in what capacity?

A. U.S. Army Missile Crew, Everglades National Park.

Q. Is your base at the Homestead Air Force Base?

A. I'm based at Everglades National Park, assigned from Homestead Air Force Base.

Q. Where do you make your home?

A. Original home?

Q. Yes.

A. Tennessee, Lexington, Tennessee.

Q. What is your parents address?

A. I don't know, they live in St. Louis. I think it's 2804 A Victor Street, St. Louis, I'm not sure.

Q. Gary, before we go any further I would like to show you this form and ask you if you recognize it (indicating).

A. Yes, sir.

Q. And is that your signature at the bottom?

A. Yes.

Q. Did you read this form titled Constitutional Rights Warning Interrogation, and fully understand everything on it?

A. Yes, sir.

Q. What grade did you go to in school?
A. Twelfth.
Q. Did you sign this form freely and voluntarily?
A. Yes.
Q. I would like to again read you the Constitutional Rights from this form to verify that you understand everything.

Before you are asked any questions, you must understand your rights.

You have the right to remain silent. You need not talk to me or answer any questions if you do not wish to do so. Do you understand?

A. Yes.
Q. Should you talk to me, anything which you say can and will be introduced into evidence in court against you. Do you understand?
A. Yes.
Q. If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel. Do you understand?
A. Yes.
Q. If you cannot afford an attorney and so desire, one will be provided without charge. Do you understand?
A. Yes, sir.
Q. Are you willing to answer the questions that I ask of you?
A. Yes, sir.
Q. Are you willing to answer these questions without the presence of an attorney?
A. Yes, sir.
Q. Are you fully aware of these rights that have been read to you?
A. Yes.
Q. And it is a fact that on previous occasions when questioned by myself and Sgt. Norris, you have also been advised of your rights at that time?
A. Yes.
Q. Gary, at the present time you are also aware that you are being charged with Second Degree Murder?
A. Yes, sir.
Q. And are you aware that the penalty of Second Degree Murder carries twenty years to life?
A. Yes.

Q. Gary, it is my understanding at this time that you want to make some corrections regarding the first statement given by you to Sgt. Norris on April 18th; is that correct?
A. Yes, it is.
Q. Let me ask this: Was everything in that statement you told Sgt. Norris the absolute truth?
A. No.
Q. Do you know what caused the death of your baby, Misty Maness?
A. Yes, sir.
Q. What was that?
A. I think it was a blood clot on the brain.
Q. Do you know how she received these injuries that caused her death?
A. Yes.
Q. Would you tell me about that?
A. The day I took her to the hospital, on Wednesday the 14th, my wife went to the store that afternoon for a few minutes and the baby was crying. I went back to the bedroom to give her the bottle and take care of her, and I rocked her for a while.
Q. Was she crying?
A. Yes.
Q. Go ahead.
A. I put her back in her bed, rocked her bed, and I guess I just lost my cool, like you said, and I slapped her twice.
Q. Where did you slap her?
A. In the jaw.
Q. How hard did you slap her in the jaw?
A. What do you mean, how hard; like I knocked her silly or what do you mean?
Q. How did the baby react after these few times?
A. She sniffed a little bit, took her bottle and laid on her side. I put the blanket back over her and waited for my wife to come back.
Q. About what time was that on Wednesday?
A. A little after 4:00, I guess.
Q. How long after that did you wife get home?
A. Just a few minutes.
Q. And how long after that did you or your wife check on the baby?

A. I guess about a half hour later my wife went to get her and feed her.

Q. And what happened then?

A. My wife called me in there, and she was pale and real limp and she had two bruises on her cheek, so we called the girl upstairs to come down, and she looked at her and said it would be a good idea if we took her over to Homestead Air Force Base.

Q. Was that Mrs. Kelly?

A. Yes, sir.

Q. What did you tell Mrs. Kelly in response to that?

A. I told her I would call Buddy at the Battery and have him come in and take her over. So I called Buddy at the Battery and he said he would be in as soon as he could. And he didn't come, so we went and got Mrs. Kelly and she took us over.

Q. How long was your wife gone that afternoon leaving you alone with the baby?

A. About four or five minutes, just to the store and back.

Q. After you struck the baby these two times in the jaw, did the baby remain quiet from then on?

A. You couldn't hear her anyway, the bedroom door was closed and the T.V. was on.

Q. Did you strike her with the open hand or the fist?

A. Open hand.

Q. In what manner, a forward stroke and back-hand, or two forward strokes?

A. Two forward strokes.

Q. Was the baby laying down or sitting up at that time?

A. Laying down. I think it was a forward stroke and a back stroke.

Q. A back-hand after the first?

A. Yes.

Q. Prior to this time, were there other occasions which the baby upset you by its crying?

A. I guess so.

Q. How upset would you get with the baby?

A. You mean when I hit her again, like that?

Q. How many times have you struck the baby in the face?

A. Never. I smacked her jaw once, I think. There was an occasion when I did smack her jaw once before, but I didn't hit her hard.

Q. Do you know how the child broke its left arm?

A. No, sir. I've been told how everybody thinks it broke its left arm.

Q. Was there ever an occasion in which you roughly transferred the baby from one side of the car to the other?

A. I had her arm once and slid her across the seat; is that what you mean?

Q. Yes, if that is what you did.

A. I didn't jerk her across.

Q. Which arm did you bring her across the seat with?

A. I believe it was the right arm.

Q. Your baby had a broken leg. Do you know how that happened?

A. No, sir.

Q. Did you ever have occasion to strike her legs?

A. I smacked her legs once in the car.

Q. How many times did you smack her legs?

A. I believe two.

Q. Which leg did you smack?

A. I don't know.

Q. Did you smack her legs hard?

A. I guess it would be the right leg.

Q. Do you recall the first two times that Misty Maness, your child, was brought to the Homestead Air Force Base Hospital with bruises?

A. Yes, sir.

Q. Can you tell me how those bruises were afflicted?

A. That happened like we said, she bumped her head on her bed.

Q. Going back, Gary, when did you first meet your wife, Linda, approximately?

A. Right after I come back from Nom, August of '69, I believe.

Q. When did you marry her?

A. December '69. I believe it was December '69.

Q. Did you marry her for any other reason besides love?

A. She was pregnant.

Q. Pregnant by you?

A. Yes, sir.

Q. And after your marriage to her, was there an occasion when you and your wife were separated?

A. Yes, sir.

Q. How long a period was that?

A. Before I went down before the baby was born?

Q. Yes.
A. It would be about seven or eight months.
Q. And did you return to El Paso to stay with your wife again in the summer of last year?
A. Yes, I did.
Q. And were you present when the baby was born?
A. Yes, sir.
Q. Was there ever occasions between then and now that you had discussed divorce with your wife or with anybody else?
A. Yes, sir.
Q. Often?
A. Not very often, no.
Q. Have you ever seriously considered divorce?
A. I did once.
Q. When did you come to Homestead, approximately?
A. It was in February of '70.
Q. That was the first time, right?
A. Yes.
Q. When did you come back to Homestead the next time?
A. (No response).
Q. Let's put it this way: How long have you lived in Homestead currently?
A. About a year and a half.
Q. But you were away from Homestead for a while; correct?
A. Two months.
Q. Then when did you finally return to Homestead and have stayed here?
A. What is that?
Q. How old was your baby when you left El Paso?
A. She was, I guess, about a month old.
Q. Did your wife stay in El Paso while you came here?
A. Yes, sir.
Q. When did your wife come to stay with you in Homestead?
A. March 12th.
Q. And since March 12th until now, or until the death of your child, have you ever seen Linda abuse the child physically in any way?
A. Never, just spank her.
Q. Spanked her how?
A. On the butt.

Q. Roughly?
A. No.
Q. Did she ever attempt to stop you from striking the child?
A. No. She said something once, but physically like that, no.
Q. What did she say once?
A. She said she didn't think I should spank the baby.
Q. Did she comment on how hard you were spanking the baby?
A. I don't remember.
Q. Was there ever a time when you sent your wife out of the room when you were spanking the baby?
A. Yes.
Q. How many times did that occur?
A. Three or four, I guess.
Q. Why would you send Linda out of the room?
A. Because the baby would look at her, and as long as she could see Linda, she wouldn't go to sleep.
Q. And were you spanking the baby at these times?
A. I spanked her once or twice.
Q. Where did you spank her on these occasions?
A. On the butt.
Q. Have you ever had a problem with your temper?
A. You mean do I lose it a lot?
Q. Yes.
A. I holler a lot, nothing physical.
Q. Have you ever had occasion to lose your temper at the baby and holler at it?
A. Yes, sir.
Q. What would you holler to the baby?
A. I would holler and tell her to be quiet or to lay down.
Q. Is there some reason why you began resenting the baby after Linda came here to Homestead to meet you?
A. No, sir.
Q. Did the baby ever show you resentment?
A. It would cry once in a while when I picked it up.
Q. Did that bother you?
A. Not really, no.
Q. Since the beginning of this investigation, has any police officer or anyone else mistreated you?
A. No, sir.

Q. Has anybody threatened or coerced you at any time in order to make you give a statement?
A. No.
Q. Have you given this statement knowing full well all of your Constitutional rights to an attorney before?
A. Yes, sir.
Q. And have you given this statement freely and voluntary of your own free will?
A. Yes, sir.
Q. Is there anything more you want to say?
A. No, sir.

(Thereupon, the statement was concluded.)

I, Gary R. Maness, have read the foregoing statement, pages 1 through 9, and find it to be true and correct.

Gary R. Maness

GARY R. MANESS, W/M

Sworn and subscribed to before me this 26th day of April, 1971.

STILLS S. SOUTHERN
Notary Public State of Florida At Large

My Commission Expires Jan. 13, 1975

Central Insurance Underwriters, Inc.

SGT. MARSHALL FRANK

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 71-4452

THE STATE OF FLORIDA,
Plaintiff,
vs.
GARY MANESS,
Defendant.

ASSIGNMENTS OF ERROR

The defendant assigns as error the following judicial acts of the court below, intended to be relied upon in the District Court of Appeal, Third District, for the reversal of the judgment and sentence entered in the above-styled cause:

1. The trial court erred in denying defendant's Motion for Directed Verdict at the close of the State's case.
2. The trial court erred in denying defendant's Motion for Directed Verdict at the close of all the evidence.
3. The trial court erred in denying the defendant's Motion for a New Trial.
4. The trial court erred in admitting into evidence an involuntary confession.
5. The trial court erred in admitting into evidence a confession obtained where the defendant had not been taken before a committing magistrate without unnecessary delay.
6. The trial court erred in admitting into evidence hearsay testimony prejudicial to the defendant.
7. The trial court erred in admitting into evidence enflammatory and prejudicial photographs.
8. The trial court erred in denying a defense motion to question Linda Maness as a hostile witness.
9. The trial court erred in excluding the testimony of Dana Maness and Ruth Maness relating to conversations with Linda Maness.

Respectfully submitted,

PHILLIP A. HUBBART
Public Defender
11th Judicial Circuit of Florida
By:
BENNETT H. BRUMMER
Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 71-1206

GARY MANESS,
Appellant

vs.

THE STATE OF FLORIDA
Appellee

APPEAL FROM THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

BRIEF OF APPELLANT

PHILLIP A. HUBBART
Public Defender, and

BENNETT H. BRUMMER
Assistant Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

Attorneys for Appellant

STATEMENT OF THE FACTS

Pursuant to an investigation of the defendant and his wife, the defendant was arrested by Sgt. Marshall Frank of the Dade County Public Safety Department on April 26, 1971 (R.188). The defendant, after being taken into custody by Sgt. Frank was brought by the Sgt. to his office rather than to the county jail (R.188). At this time, the defendant gave a statement to Sgt. Frank, due to his desire to keep his wife, whom he thought was pregnant, from being taken to jail (R.189). The defendant did so as a result of conversations with Sgt. Frank, who suggested this course of action to the defendant (R.294). The Sgt. testified that while ". . . writing out some paperwork . . .", the defendant, without any word from the Sgt., "requested" to give a confession (R.189). The defendant was thereupon warned of his constitutional rights, both verbally and with the use of a Constitutional Rights Warning form which the defendant signed (R.191,196). The defendant then called his wife and told her that he was confessing for her sake. Sgt. Frank admits the call but knew nothing of its substance (R.232, 294). After signing the form a confession was taken with the aid of a court reporter, signed by the defendant and notarized (R.203-215).

In the confession, the defendant related that he had lost his cool, like Sgt. Frank said and had *slapped the baby twice* in the jaw (R.204). The defendant further stated that this was done during the time his wife had gone to the store (R.203). The defendant stated that he was not the cause of previous injuries sustained by the child and that he had no knowledge of how the child sustained a broken arm and broken leg (R.207,208). As to previous bruises, the defendant stated that these were self-inflicted (R.209). The defendant also stated that while he resided at Homestead Air Force Base, his wife and child did not come there until March 14, 1971, approximately four weeks prior to the death of the child. (R.212).

It was the testimony of Sgt. Frank that all of the foregoing took place without the defendant being taken before a magistrate for a preliminary hearing (R.189).

At the trial, the defendant's motion to suppress the confession, was denied and his objection to its introduction as involuntary was overruled (R.30,216).

During jury selection, the State seated jurors who displayed an affinity towards children (R.33-99). One juror in particular, Mrs. Caroline Jaffie, in response to questions concerning her feelings about children stated, "I just love children." (R.100).

The State's first witness was Caroline Kelley, a neighbor of defendant and his family. Miss Kelley identified the victim as Misty Maness, the daughter of the defendant (R.119).

Following Miss Kelley, the State presented three medical witnesses. The first of these was Doctor Aftab Khan, a deputy county medical examiner. Doctor Khan performed the post mortem examination and testified as to his findings. The doctor first graphically described the bruises on the victim's cheeks and forehead (R.122-124). Doctor Kahn then testified as to other injuries previously sustained by the child. These injuries, according to the doctor, were a fracture of the left arm, one to two weeks old, fracture of the right thigh bone, three to six weeks old, and a lip injury, a few days to several weeks old (R.126-128,130). Doctor Kahn then testified that the death was caused by the combination of wounds to the head (R.129,131). Doctor Kahn then testified that two slaps in the face would *not* cause the injuries or the death (R.130). On re-direct the Doctor testified that severe blows with a fist or hand would produce the injuries (R.135).

The State's next two witnesses were the doctors who treated the child on the day in question, April 14. The first was Doctor Earl Sturge, the physician in charge of the Air Force Hospital, and the second was Doctor Bernard Fogel, who saw the child when she was brought to Jackson Memorial Hospital for treatment. Both doctors testified that the child was in a comatose condition and then gave complete and graphic descriptions of the same bruises previously testified to by Doctor Khan (R.138-139,147). Additionally, both testified that the injuries were not self-inflicted (R.150). Doctor Fogel then testified further that in his opinion, Misty's symptoms might be indicative of the battered child syndrome, or repetitive abuse (R.151-154).

The State's next witness was one Madeline Keith who met the defendant once at the end of March, 1971, and observed the bruised child being taken to the hospital (R.157).

The witness was not able to remember what the defendant had said about the child's injury (R.161).

The State followed with Lt. Norris of the Homicide Department and introduced, over defendant's objections, three color photographs of the bruises on the child's face (R.170-179).

Caroline Kelley was recalled by the State and testified that from her upstairs apartment and doorway, she saw the defendant grab the child by its arm and jerk it across the car seat (R.185). The testimony was to the effect that this occurred approximately two to three weeks before the date in question (R.185).

The defendant's motion for a directed verdict at the close of the State's case was denied (R.243).

The testimony on behalf of the defendant began with Linda Maness, the defendant's wife. After the court denied defendant's request to have the witness declared hostile, the witness testified that in the morning of April 14, the child already had a bruise on her forehead. The witness did not know the origin of the bruise (R.246,248). She further testified that she went out to the store at about 4:00 p.m. leaving the child, who was apparently well, with the defendant. When she returned, the child was in the condition previously described (R.250).

The defendant, Gary Maness, testified that his wife had told him that she was pregnant on the day in question (R. 280). The defendant further testified that he and his wife had gone to the defendant's home town to bury their daughter (R.288). The defendant related that during the investigation of him and his wife he was questioned by Sgt. Frank, who told him he had lost his cool while his wife was at the store (R.290). The defendant then testified that he made the statement to Sgt. Frank to protect his wife, prior to which he had informed his wife by telephone of his intentions (R.294). On cross-examination, the defendant testified that his wife was not at the store and that the story had been agreed upon earlier between him and his wife (R.310, 311). On redirect, the defndant reiterated that he gave the statement to Sgt. Frank only because he believed his wife was pregnant and Sgt. Frank had told the defendant that only if he made a statement could he keep his wife out of jail (R.317, 320).

The defense then called Dana Maness. In the absence of of the jury, proffer was made to the court that the witness would testify as to the substance of a conversation between the witness and the defendant's wife which had taken place when they were in Tennessee burying the child (R.324). The proffer revealed that the defendant's wife had stated that ". . . Gary did not touch the baby; . . . and that she never left her home to go to the store and leave the baby alone during the date of April 14, 1971" (R.324). The court precluded the witness from testifying on the basis that the defendant would be impeaching his own witness (R.324).

The defense concluded its case with the testimony of Captain Ronald Peters, the defendant's superior officer, and Ruth and Ora Maness, the defendant's parents. All three testified as to the defendant's good reputation for truth and veracity (R.335, 337, 338).

After retiring for consideration, the jury requested to see the defendant's statement and the pictures of the child's bruised face (R.399).

The defendant was thereafter adjudicated guilty and sentenced to a term in the State Penitentiary (R.403).

POINTS INVOLVED ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN THAT THE STATE FAILED TO PROVE THAT THE DEFENDANT WAS RESPONSIBLE FOR THE CHILD'S DEATH.

II. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE PHOTOGRAPHS WHICH WERE HIGHLY INFLAMMATORY AND PREJUDICIAL AND WHICH BORE NO RELEVANCE TO THE CASE AT BAR.

III. WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DANA MANESS THUS DENYING DEFENDANT A FAIR TRIAL, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW AND THE DOCTRINE SET OUT IN *WASHINGTON v. TEXAS*.

IV. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DEFENDANT'S STATEMENT OBTAINED FROM HIM INVOLUNTARILY DUE TO IMPROPER PSYCHOLOGICAL COERCION.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN THAT THE STATE FAILED TO PROVE THAT THE DEFENDANT WAS RESPONSIBLE FOR THE CHILD'S DEATH.

The trial court should have directed a verdict of acquittal in that the State failed to prove beyond a reasonable doubt that the defendant was responsible for the child's death.

The State failed to produce any direct evidence whatsoever regarding the issue of who caused the child's death. The only evidence introduced by the State in its efforts to establish that the defendant was responsible for the death was circumstantial.

The testimony pertaining to this issue shows that: (1) In the opinion of Doctor Fogel the child might be a battered child (R.151); (2) One day, from her upstairs doorway, Caroline Kelley saw the defendant jerk the child across the seat of his car (R.185). She was not able to say that the child was in any pain; (3) Madeline Keith met the defendant once about three weeks prior to the child's death. The witness was unable to recall what was actually said by the defendant regarding the child's bruised condition at that time (R.161); (4) The defendant, in his statement to Sgt. Frank, admitted striking the child twice when he lost his cool like the Sgt. said he did. However, the testimony of Doctor Kahn was that two blows could *not* have caused the injuries or the death of the child (R.204, 130).

It is well-established that when the State relies upon purely circumstantial evidence to convict the accused, such evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of his innocence. *Mayo v. State,* 71 So.2d 899 (Fla. 1954). The sum of the testimony against the defendant in the instant case plainly fails to meet this test.

One reasonable hypothesis of the defendant's innocence is that the defendant's wife was the responsible party. The defendant testified that he confessed to save his wife whom he thought was pregnant. He subsequently retracted the confession. The defense proffered the testimony of Dana Maness to support this theory, but the trial court prevented the witness from testifying.

Additionally, the acts which the defendant confessed to were not sufficient to have caused the death of the child. The defendant admitted to striking the child twice in the jaw. The State's medical experts established that multiple severe blows to the head would have been necessary to cause the injuries to the forehead and cheeks and result in death. Thus, even when the defendant sought to incriminate himself, he did not have adequate knowledge of how the injuries were inflicted to be able to admit to the necessary acts (R.351, 383, 135).

In *Mayo, supra,* it was also held that evidence raising only a suspicion is insufficient to convict, as is a probability of one hypothesis over another, no matter how strong the probability. For "it is the exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict." *Davis v. State,* 90 So.2d 629 (Fla. 1956).

The scant and contradictory evidence presented by the State in this case plainly cannot justify more than mere suspicion or a probability of guilt and cannot exclude every reasonable hypothesis of innocence. The evidence does not show beyond a reasonable doubt that the defendant's wife was not responsible for the child's death or that the defendant was responsible.

• • • •

ARGUMENT

III. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DANA MANESS THUS DENYING DEFENDANT A FAIR TRIAL VIOLATING HIS RIGHT TO DUE PROCESS OF LAW AND THE DOCTRINE SET OUT IN *WASHINGTON v. TEXAS.*

The crucial issue at the defendant's trial was whether it was the defendant who had beaten his child to death. The defendant's wife, when called by the defense, gave testimony consistent with the State's case and with the defendant's extrajudicial statement (R.250). The defendant testified that this story was one he had previously agreed upon with his wife (R.310, 311). The defendant also testified that these were not the true facts, and that he had been acting to protect his wife (R.294), whom he thought was pregnant.

Upon calling Dana Maness, a proffer was made that the witness would clear up the conflict, by testifying that while in Tennessee, the defendant's wife had told her that defendant did not strike the child, nor was he home alone while she was at the store (R.324). The witness was precluded from testifying based on the court's view that this would be contrary to a rule of evidence which prevents one from impeaching his own witness (R.324). As Dana Maness was the *only* person who could solve the crucial issue, it was error for the court to exclude her. Barring the witness created an insurmountable obstacle in the presentation of the defense and the search for the truth. The due process right to a fair trial has been held to include the presentation of necessary witnesses. *Baldwin v. Hale,* 68 U.S. 223 (1863); *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960). See also, *Norman v. State,* 156 So.2d 186 (3rd DCA 1963).

In *Washington v. Texas,* 388 U.S. 14 (1967), the Supreme Court of the United States equated the right to offer testimony with the right to present a defense. Just as a State competency statute under *Washington, supra,* could not be used to deny fundamental fairness. The evidence excluded was readily available and highly relevant to the resolution of the *sole material issue.* Unless this court can say beyond a reasonable doubt that the exclusion of Dana Maness'

testimony to the effect that the defendant did not hit the child and that contrary to her testimony, his wife did not go to the store but was at home with the defendant, was harmless beyond a reasonable doubt, the exclusion constitutes constitutional, reversible error. *Chapman v. California,* 386 U.S. 18 (1967).

Additionally, the trial court's interpretation of the rule against impeachment of one's witness, which was the basis for the exclusion, is erroneous.

ARGUMENT

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DEFENDANT'S STATEMENT OBTAINED FROM HIM INVOLUNTARILY THROUGH IMPROPER PSYCHOLOGICAL COERCION ON THE PART OF SGT. MARSHALL FRANK.

The defendant testified that, under the prodding of Sgt. Frank, he confessed in order to save his wife from jail (R.294).

A confession given by one who lacks capacity to exercise a free will, or who is psychologically coerced into confessing, cannot be introduced into evidence against him. *Reddish v. State,* 167 So.2d 858 (Fla. 1964). In the instant case, the defendant's statement should have been excluded, and allowing it as a link in the chain of evidence requires reversal of the case. *Reddish,* supra. See also *Rogers v. Richmond,* 365 U.S. 534, 541 (1960); and *Townshend v. Sain,* 372 U.S. 293, 307 (1962). The Florida Supreme Court has further held that the mind of the defendant must be free to act uninfluenced by either hope or fear, and that the test is whether the inducement was calculated, under the circumstances, to induce a confession whether it be true or false. *Frazier v. State,* 107 So.2d 16 (1958).

The facts of the present case bear out that the defendant gave his statement, due to the threat of Sgt. Frank against his wife, in the hope that his wife would not be taken to jail. The defendant's mind was undeniably influenced by Sgt. Frank's threat against his wife to throw her in jail if he (the defendant) did not confess, and he acted out of fear for her *and* hope that he could save her (R.294, 317, 320). Indeed, the excluded testimony of Dana Maness (see Point III, *supra*) bears out the fact that the defendant confessed in the hope of saving his wife. The defendant even confessed using words supplied by Sgt. Frank, (R.204, 290) as to his loss of cool and slapping the child. The Supreme Court in *Columbe v. Connecticut,* 367 U.S. 568 (1961), set out the test as being one of voluntariness, judged by whether the confession is the product of a free and unconstrained choice. The Court further stated that determination should be made by looking at the facts surrounding

the confession, the internal "psychological" facts and applying these to the legal concepts. Plainly, the defendant here has acted out of hope, fear and choice dictated by the inducement of safety for his wife put forth by Sgt. Frank. Thus, the defendant's "confession" was involuntary and should have been excluded.

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Gary MANESS, Appellant,

v.

The STATE of Florida, Appellee.

No. 71-1206.

District Court of Appeal of Florida, Third District.

May 30, 1972.

Defendant was convicted before the Criminal Court of Record for Dade County, Ellen Morphonios Rowe, J., of manslaughter, and he appealed. The District Court of Appeal held that denial of defendant's objection to introduction of photographs disclosing injuries of victim was proper, where such photographs were not gruesome and were relevant, and where court refused to admit other photographs showing entire body of victim and admitted only those which were considered relevant and which revealed nature and appearance of injuries to the face and head, and that denial of attempt by defendant to impeach his own witness was not error.

Judgment affirmed.

1. Criminal Law ⇐438

Denial, in manslaughter prosecution, of defendant's objection to introduction of photographs disclosing injuries of victim was proper, where such photographs were not gruesome and were relevant, and where court refused to admit other photographs showing entire body of victim and admitted only those which were considered relevant and which revealed nature and appearance of injuries to the face and head. F.S.A. § 782.07.

2. Witnesses ⇐380(5)

Denial, in manslaughter prosecution arising out of alleged assault by defendant of his infant child, of attempt by defendant to impeach testimony of his wife, who testified as his witness, that she had gone to store for a short time and that when she returned the child was in injured condition, with evidence that she had told another person that she had not gone to store was not error, where defendant stated in written confession that his wife had gone to the store, that the child started crying, that he struck the child and that his wife returned a few minutes later. F.S.A. § 782.07.

3. Criminal Law ⇐531(3)

Record supported conclusion of trial court that confession was freely and voluntarily given.

Phillip A. Hubbart, Public Defender, and Bennett H. Brummer, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and J. Robert Olian, Asst. Atty. Gen., for appellee.

Before BARKDULL, C. J., and CHARLES CARROLL and HENDRY, JJ.

PER CURIAM.

By information the appellant was charged with the crime of manslaughter (§ 782.07 Fla.Stat., F.S.A.). The information alleged the defendant caused the death of his infant child by culpable negligence by assaulting the child with his hands and fists. Upon trial before a jury he was convicted. He was sentenced by the court to imprisonment for twenty years. The defendant appealed.

Upon consideration of the several contentions of error submitted by the appellant, in the light of the record and briefs, we find them to be without merit. Denial of the defendant's motion for a directed verdict was not error. The record discloses competent substantial evidence of the guilt of the defendant of the offense charged, amply sufficient to support the conviction.

[1] Denial of defendant's objection to introduction into evidence of photographs, disclosing injuries of the child, was proper. The photographs were not gruesome, and clearly were relevant. See Kitchen v. State, Fla.1956, 89 So.2d 667; Karl v. State, Fla.App.1964, 144 So.2d 869; Lipford v. State, Fla.App.1964, 161 So.2d 16; Roberts v. State, Fla.App.1967, 195 So.2d 257; Dillen v. State, Fla.App.1967, 202 So.2d 904. Moreover, all photographs which were offered were not admitted. The record shows there was extended discussion relating thereto, and that the court refused to admit photographs showing the entire body of the child, and admitted those which the court considered relevant that revealed the nature and appearance of injuries to the face and head.

[2] An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the state. Exceptional circumstances which would require a contrary ruling thereon were not present or shown. The witness involved was the defendant's wife. She testified she had gone to a store for a short time; that when she left the child was all right, and when she returned the child was in the injured condition. In an effort to impeach the witness the defendant proffered testimony of another witness to the effect that the wife had told the latter she did not go to the store on the occasion in question. However, the defendant by his written confession which was presented in evidence was shown to have admitted striking the child during the time his wife was at the store. Therein he stated his wife had gone to the store, that the baby started crying, that he struck the child, etc. and that his wife returned a few minutes later. In the circumstances disclosed, the challenged ruling of the court was not error. See Hernandez v. State, 156 Fla. 356, 22 So.2d 781; Foremost Dairies, Inc., of the South v. Cutler, Fla.App.1968, 212 So.2d 37.

[3] The admission of the confession of the defendant was not error. Its admissibility was determined by the court upon hearing outside of the presence of the jury. The record supports the conclusion of the trial judge that the confession was freely and voluntarily given.

No reversible error having been made to appear, the judgment is affirmed.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PERSONS IN STATE CUSTODY

GARY MANESS #031957
Full name and prison number (if any) of petitioner

——vs——

LOUIE L. WAINWRIGHT, Director Division of Corrections Department of Health and Rehabilitative Service, State of Florida.

No. 73-1664-Civ-PF

• • • •

1. Place of detention Arcadia, Florida (Petitioner's address P.O. Box 1033, Arcadia, Florida)
2. Name and location of court which imposed sentence Criminal Court of Record In and For Dade County, Florida, 1351 N.W. 12 Street, Miami, Florida.
3. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) Information No. 71-4452, charging that the defendant caused the death of his infant child by culpible negligence by assaulting the child with his hands and fists in violation of Florida Statute §782.07 (Manslaughter Statute).
4. The date upon which sentence was imposed and the terms of sentence:
   (a) October 5, 1971; Petitioner sentenced to be confined to the
   (b) State Prison for a period of twenty years.
   (c)
5. Check whether a finding of guilty was made:
   (a) after a plea of guilty
   (b) after a plea of not guilty XXXXX
   (c) after a plea of nolo contendere
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury XXXXX
   (b) a judge without a jury
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7) list
   (a) the name of each court to which you appealed:
      i. District Court of Appeal of Florida, Third District.
      ii.
      iii.
   (b) the result in each such court to which you appealed:
      i. Affirmance of trial court.
      ii.
      iii.
   (c) the date of each such result:
      i. May 30, 1972
      ii.
      iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results

i. Maness vs. State, 262 So.2d 716 (Fla.3d Dist. 1972).

ii.

iii.

9. If you answered "no" to (7) state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Please see paragraphs 9&10 of the Petition For Writ of Habeas Corpus and Memorandum in support thereof filed herewith.

(b)

(c)

11. State concisely and in the proper order the facts which support each of the grounds set out in (10):

(a) Please see paragraphs 9 & 10 of the Petition For Writ of Habeas Corpus and Memorandum in support thereof filed herewith.

(b)

(c)

12. Prior to this petition have you filed with respect to this conviction

(a) any petition in a State of Florida court under the provisions of Criminal procedure Rule 1 of the Florida Supreme Court? No, please see paragraph 10 of the Petition For Writ of Habeas Corpus and Memorandum in support thereof filed herewith.

(b) any petition in State or Federal courts for habeas corpus?

No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?

No

(d) any other petitions, motions or applications in this or any other court? No

13. If you answered "yes" to any part of (12), if with respect to each petition, motion or application

(a) the specific nature thereof:

i. Not applicable

ii.

iii.

iv.

(b) the name and location of the court in which each was filed:

i. Not applicable

ii.

iii.

iv.

(c) the disposition thereof:

i. Not applicable

ii.

iii.

iv.

(d) the date of each such disposition:

i. Not applicable

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Not applicable

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed: Yes,

15. If you answered "yes" to (14) identify

(a) which grounds have been previously presented:

i. Please see paragraphs 9 & 10 of the Petition and Memorandum in support thereof filed herewith.

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Please see paragraphs 9 & 10 of the Petition and Memorandum in support thereof filed herewith.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Not applicable

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes, Carl Minkus, Esq.

(b) your trial if any? Yes, Carl Minkus, Esq.

(c) your sentencing? Yes, Carl Minkus, Esq.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, Public Defender's Office, Dade County, Florida.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes,

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Carl Minkus, Esq. 7145 Collins Avenue, Miami Beach, Florida

ii. Office of the Public Defender, 11th Judicial Circuit in and for Dade County, Florida.

iii. Albert G. Caruana and Bennett Brummer, American Civil Liberties Union of Florida, Miami Chapter.

(b) the proceedings at which each such attorney represented you:

i. Carl Minkus, Esq., jury trial

ii. Office of the Public Defender for Appeal to the District Court of Appeal, Third District

iii. Albert G. Caruana and Bennett Brummer, A.C.L.U., Petition For Writ of Federal Habeas Corpus.

19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth required information (see instructions page 1 of this form)? Yes

Gary Manss
Signature of Petitioner

)
) ss:
)
)

Gary Manss, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Gary A Hamblin
Signature of Affiant

SUBSCRIBED and SWORN to before me this
26 day of Sept., 1973

Gary A Hamblin
Notary Public

My commission expires:
Notary Public, State of Florida at Large
My Commission Expires Apr. 19, 1977
Bonded by American Fire & Casualty Co.

(month, day, year)

[illegible] attorney

(see instructions, page 1 of this form)

I, the undersigned petitioner, hereby certify (or declare) under penalty of perjury that the following facts are true:

(1) - I am the named petitioner in the foregoing proceedings.
(2) I represent to the court that the sum total of funds now on deposit with the prison authorities in my name is $ _____, and I am entirely without any other financial resources with which to pay the statutory fee or costs of these proceedings.

Gary Manss
Signature of petitioner

)
)
) ss:
)
)

Gary Manss being first sworn under oath, presents that he has subscribed to the above and does state that the information herein is true and correct to the best of his knowledge and belief.

Gary A Hamblin
Signature of Affiant

SUBSCRIBED and SWORN to before me this
26 day of Sept.
month
1973.
year

Gary A Hamblin
Notary Public

My commission expires:
Notary Public, State of Florida at Large
My Commission Expires Apr. 19, 1977
Bonded by American Fire & Casualty Co.

(month, day, year)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Miami Division

73-1664-Civ-PF

GARY MANESS, Petitioner, vs. LOUIE L. WAINWRIGHT, Director, Division of Corrections, Department of Health and Rehabilitative Services, State of Florida, Respondent.	PETITION AND MEMORANDUM FOR WRIT OF HABEAS CORPUS

Petitioner, GARY MANESS, by his undersigned counsel, pursuant to Title 28 United States Code §2254 and Rules 22 and 23 of the Federal Rules of Appellate Procedure and Rule 18 of the Local Rules of Procedure for the Southern District of Florida, hereby petitions this Honorable Court for a Writ of Habeas Corpus, and in support hereof shows unto this Court:

1. Petitioner is GARY MANESS, Prisoner #031957, who is currently incarcerated in the custody of respondent and whose present address is P.O. Box 1033, Arcadia, Florida, 33812;

2. Petitioner was informed against in April of 1971, Information Number 71-4452, by RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, and charged with manslaughter in violation of Florida Statute §782.07 (R.406);

3. Petitioner interposed a plea of not guilty to the above referenced charge and a jury trial was had on October 4 and 5, 1971, in the Criminal Court of Record in and for Dade County, Florida, The Honorable ELLEN J. MORPHONIOUS (ROWE) presiding;

4. On October 5, 1971 the jury returned a verdict of guilty and the Court adjudged petitioner guilty and sentenced petitioner to be confined to the state prison for a period of twenty years (R.403);

5. Petitioner timely appealed from the judgment of conviction and sentence to the District Court of Appeal of Florida, Third District (R.441-446), but the trial Court was affirmed *Maness v. State,* 262 So.2d 716 (Fla.3d Dist.1972);

6. At the pre-trial and trial stage petitioner was represented by counsel, CARL MINKUS, ESQUIRE. Petitioner was represented on appeal by the office of the Public Defender for the Eleventh Judicial Circuit of Florida;

7. Subsequent to his conviction and appeal, petitioner has not filed in any Court, State or Federal, previous petitions or applications for Habeas Corpus Relief;

8. Petitioner is presently in custody pursuant to the above mentioned Judgment of the Florida trial Court in violation of the Constitution of the United States.

9. The following are the facts upon which the petitioner's claim is based:

Petitioner was charged with causing the death of his infant child by culpable negligence. The crucial issue at petitioner's trial was whether it was the petitioner who had beaten the child to death or whether it was petitioner's wife, LINDA MANESS, who had actually committed the offense.

The petitioner testified at his trial that he had made an inculpatory extra-judicial statement to the police to protect his wife, LINDA MANESS, whom he thought was pregnant. Petitioner further testified that the statement he had previously given was one which had been agreed upon with his wife prior to their interrogation by the police and was not, in fact, the true version of what had happened. (R.291-297, 250, 310-311)

Petitioner's trial counsel called petitioner's wife, LINDA MANESS, as a witness and asked the Court to declare the witness an adversary and hostile witness. The Court refused to permit the defense to treat LINDA MANESS as an adversary and hostile witness. LINDA MANESS testified consistently with the State's position, and defense counsel's attempts to impeach her testimony, in which she *inter alia* denied striking the baby, were prohibited by the Court on the grounds that the defense would not be permitted to impeach its own witness. (R.245-270) Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by LINDA MANESS. (R.252-260)

Later in the trial, defense counsel called DANA MANESS

as a witness. (R.322) The State objected to her testimony on the grounds that it tended to impeach LINDA MANESS, whom the State argued was a defense witness and therefore could not be impeached by the defense. This objection was sustained by the trial Court. (R.323) Defense counsel then proffered to the Court that DANA MANESS would testify that while in Tennessee LINDA MANESS had a conversation with her in which she told DANA that GARY MANESS did not touch the baby and that she did not know what had happened, but that GARY MANESS did not do what he had been charged with. (R.324) The Court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from impeaching his own witness. (R.323-324) The following constitutes the relevant portion of the trial transcript involving DANA MANESS:

"DANA MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MINKUS:

Q. Calling your attention to——

THE COURT: Let's find out who she is.

MR. MINKUS: Oh, yes.

Q. (By MR. MINKUS) What is your name?
A. Dana Maness.
Q. What is your address?
A. 95 Kenlingwood (phonetic), Brentwood, Missouri.
Q. What relation are you to the accused?
A. His sister-in-law.
Q. Calling your attention to April 22, 1971, did you have occasion to have a conversation with one, Linda Maness?
A. Yes——

MR. MCWILLIAMS: Objection.

A. (Continued)——I did.

THE COURT: Sustained, until we find out what the purpose is.

Q. (By MR. MINKUS) Dana——

MR. MINKUS: Well——

THE COURT: Do you want to make a proffer outside the presence of the jury?

MR. MINKUS: Yes, I do.

THE COURT: All right.
Ladies and gentlemen, step into the jury room for a moment.

(Thereupon, at 8:55 o'clock p.m., the jury retired to the jury room.)

THE COURT: Proffer. Just tell me——

MR. MINKUS: She is going to state that there was a conversation in an automobile in Tennessee where they were burying the baby and there was also another girl present, the sister of the defendant, who was not able to be here because she is having a baby, where she said——where Linda Maness said——that Gary did not touch the baby; that she did not know what happened and that she never left her home to go to the store and leave the baby alone during the date of April 14, 1971.

MR. MCWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.

MR. MINKUS: Well then, there was another conversation on April 23, wherein Linda Maness made the statement to the effect that Gary didn't do it.

MR. MCWILLIAMS: Same objection.

THE COURT: Sustained.

MR. MINKUS: I don't have any questions of this witness, then.

THE COURT: All right.
How many more witnesses do you have?

MR. MINKUS: I have one——oh, I have about two, two or three.

THE COURT: All right. Do you want to proffer what that is, so that we don't have the jury running in and out?
Ma'am, would you step outside, please.

MR. MINKUS: Mrs. Maness came.

MR. MCWILLIAMS: What's her first name?

MR. MINKUS: Mrs. Ruth Maness, the mother of the defendant. She came to the home of the accused during the week of April 14 to the 22nd, or until the 18th, while the baby was lying in the hospital; that there were found some bloody baby blankets, and that Linda Maness was asked, "How did this blood get on these?" And she said that they got on the blanket because she had her period.

MR. MCWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.
It will be sustained." (R.322-325)

Defense counsel attempted to call RUTH MANESS, mother of the petitioner-defendant, but the State objected to her testimony (as proffered) on the grounds that it tended to impeach LINDA MANESS, a defense witness, and therefore was improper. The Court sustained the prosecution's objection. (R.325)

The Court's rulings that the defense would not be permitted to impeach LINDA MANESS' testimony because she had been called by the defense amounted to a deprivation of your petitioner's constitutional rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Defense counsel had asked the Court for permission to treat LINDA MANESS as an adverse witness so that it could impeach her statement regarding the commission of the offense with which the defendant was charged. Defense counsel was trying to show that LINDA MANESS and *not* the petitioner had battered the child and caused the child's death. He was precluded from doing so by the trial Court's ruling regarding the impeachment of one's own witness. Moreover, when the defense called DANA MANESS and RUTH MANESS and proffered that both witnesses would testify that LINDA MANESS made inculpatory statements to them, thereby exculpating petitioner, the Court's ruling prohibiting their testimony on the "impeachment" basis also served to deny defendant his right to due process and a fair trial.

In *Washington v. Texas,* 388 U.S. 14,19, 87 S.Ct. 1920, 1923 (1967) (cited in petitioner's appellate brief at page 16) the Supreme Court of the United States ruled that a State evidentiary rule which had the effect of precluding the

defendant from establishing his defense contravened due process:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

More recently, the High Court in *Chambers v. Mississippi,* 93 S.Ct. 1038 (1973) held that the defendant's constitutional guarantee of due process was violated when the defendant was prohibited from showing that a witness which the defense had called had made self-incriminating statements regarding the crime with which the defendant had been charged. In *Chambers,* the defendant, who was charged with murder, called a third person (McDonald) to the stand and attempted to "cross-examine" the witness when the witness repudiated having made extra-judicial inculpatory statements regarding the offense with which the defendant was charged, which would have exculpated the defendant. The defense was prohibited from "cross-examining" or impeaching the witness, however, based on the Mississippi common law "voucher" rule of evidence which provides that a party who calls a witness "vouches" for his integrity and thus cannot impeach the witness. The defense also attempted to call three other persons who would have testified that McDonald made the inculpatory statements to them, but the Mississippi trial court (and later supreme court) held that: (1) the "voucher" rule would prohibit this impeachment of McDonald, a defense witness and, (2) such testimony by third parties would be excludable as hearsay. The Supreme Court rejected both grounds and reversed.

The issue decided in the *Chambers* case is almost exactly on all fours with the issue presented by the ruling of the trial court in the instant cause. Here, as in *Chambers,* the defense was forced to call a witness, who was not called by the State, and was precluded from showing that that witness had made inculpatory statements regarding the offense with which the defendant had been charged on the grounds that to permit such cross-examination of the witness would violate the common law rule prohibiting a party from impeaching his own witness. Here, as in *Chambers,* someone

other than the defendant made inculpatory statements and when this was sought to be introduced through third parties' testimony at trial by the defense, it was prohibited as a result of a common law rule of evidence. Here, as in *Chambers,* the defendant was denied due process of law and his right to fundamental fairness, both of which are guaranteed by the Fourteenth Amendment to the United States Constitution.

The following language of the Supreme Court is directly applicable to the instant cause.

> In large measure, he [defendant] was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence.
>
> Chambers asserts in this Court, as he did unsuccessfully in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law . . . in sum, then, this was Chamber's predicament. As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. . . . *Chamber's defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statement to cross-examination or had the other confessions been admitted.*
>
> *The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.*
>
> Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. . . . The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps

> assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal" . . . its denial or significant diminution calls into question the ultimate "integrity of the fact finding process."
>
> In this case, petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi Common Law Rule that a party may not impeach his own witness. The rule rests on the presumption-without regard to the circumstances of the particular case that a party who calls a witness "vouches for his credibility." Although the historical origins of the "voucher" rule are uncertain, it appears to be a remnant of primitive English trial practice. . . . *Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little relationship to the realities of the criminal process.*
>
> In modern criminal trials defendants are rarely able to select their witnesses: they must take them where they find them. *Chambers v. Mississippi,* 93 S.Ct 1038, 1043-46. (emphasis added)

The Supreme Court in *Chambers* specifically rejected the State's argument that the defendant must qualify a witness as "adverse" to the accused before the defendant's constitutional right of confrontation comes into play.

> [The State] argues that there is no incompatibility between the rule and Chamber's rights because no right of confrontation exists unless the testifying witness is "adverse" to the accused. . . . The argument that McDonald's testimony was not "adverse" to, or "against", Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of liberty [the victim]. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers. . . . We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against". The "voucher" rule,

as applied in this case, plainly interfered with Chambers' right to defend against the State's charges. *Id.* at 1047

In the case at bar the state trial court specifically precluded the defense from cross-examining LINDA MANESS on the grounds that the defense had not qualified her as an "adverse" witness. Such action constituted a deprivation of the petitioner petitioner's due process right to present a defense, his right to confront and cross-examine witnesses, and his right to call witnesses on his own behalf.

Moreover, in the case at bar, just as in the *Chambers* case, the defense was precluded from calling other witnesses who would have testified that LINDA MANESS had made extra-judicial inculpatory statements. In *Chambers,* the state trial court's action was approved by the Mississippi Supreme Court on the grounds that such testimony by third parties would constitute hearsay. The United States Supreme Court declared that this state evidentiary rule was violative of federal constitutional guarantees. *Id.* at 1047-48. Thus the exclusion of DANA MANESS' and RUTH MANESS' testimony on the basis of a Florida evidentiary rule which parallelled the Mississippi rule invalidated in *Chambers* violated this petitioner's federal constitutional rights.

The Supreme Court in *Chambers* summarized its holding as follows:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g., Webb v. Texas, 409 U.S. 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14,19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). . . . We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment we establish no new principals of constitutional law. *Id.* at 1049. (emphasis supplied)

The facts of the case at bar are so close to the facts of the *Chambers* case that the latter's applicability as controlling authority in this cause cannot be rationally disputed.

10. The grounds for relief relied upon in paragraph 9, *supra,* were raised by petitioner at trial and were raised by petitioner in his appeal to the District Court of Appeal

of Florida, Third District. (See copy of appellant's brief attached hereto, pages 15 and 16). The District Court of Appeal of Florida, Third District, rejected your petitioner's agrument that the trial court's ruling served to deny him due process of law by stating: "An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the State". *Maness v. State,* 262 So.2d 716,717 (Fla.3d Dist. 1972). Under Florida law, a criminal defendant has the right to one direct appeal to the District Court of Appeal (See Florida Constitution, Article V §5 (1968) and a Florida criminal defendant is not permitted to raise in a post-conviction proceeding pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, a point of law which has been raised and decided in his direct appeal. See, e.g., *State v. Biesendorfer,* 244 So.2d 147 (Fla.4th Dist. 1971) *cert. denied,* 247 So.2d 439 (Fla. 1971). Thus petitioner has exhausted the remedies available to him in the State forum and is, therefore, entitled to the relief herein prayed for. *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822 (1963); *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 397 (1953); *Wilwording v. Swenson,* 92 S.Ct. 407 (1971); *Roberts v. LaVallee,* 389 U.S. 40, 88 S.Ct. 194 (1967); *Coleman v. Maxwell,* 351 F.2d 285 (6th Cir. 1965); *McCluster v. Wainwright,* 453 F.2d 162 (5th Cir. 1972).

WHEREFORE, petitioner respectfully prays that this Honorable Court will grant this his Petition for Writ of Habeas Corpus and order the Writ to issue forthwith.

Respectfully submitted,

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Miami Chapter

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By. Albert G. Caruana
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[Certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 73-1664-CIV-PF

GARY MANESS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Director, Division of Corrections,
Respondent.

RESPONSE TO ORDER TO SHOW CAUSE AND MEMORANDUM OF LAW

The petitioner has filed a habeas corpus petition pursuant to 28 U.S.C. Sec. 2254. This memorandum of law is filed by the respondent pursuant to this Court's order dated October 26, 1973. Exhibits filed herein will be referred to alphabetically. Reference to the trial record will be designated by the symbol "R". All emphasis has been supplied unless otherwise indicated.

I

Respondent holds petitioner pursuant to a valid judgment and sentence rendered by the Criminal Court of Record in and for Dade County, Florida (now the Circuit Court, Criminal Division of the Eleventh Judicial Circuit) on October 5, 1971. (Exhibit A). Petitioner was sentenced to serve a term of twenty (20) years for the crime of manslaughter.

Thereafter petitioner appealed said conviction to the District Court of Appeal of Florida, Third District, which affirmed the action of the trial court. *Maness v. State,* 262 So.2d 716 (1972). On October 23, 1973, petitioner filed the instant Petition for Writ of Habeas in this Court. Petitioner has not sought post conviction relief from any other courts, either state or federal.

II

At petitioner's trial his wife Linda Maness was not called as a witness for the state. Rather, upon the conclusion of the prosecution's case, defense counsel produced her as a

witness on behalf of the defendant. (R. 245). Counsel then requested that the court declare Mrs. Maness an adverse and hostile witness although no predicate was laid for this request. The court denied the motion. (R. 247). It was Linda Maness's testimony that on the day in question the victim was in good health throughout the day until Mrs. Maness left about 4:00 or 4:15 p.m. When she returned she found the child in the battered condition in which she died. (R. 250). She further stated she did not know how the child was injured. (R. 252).

Defense counsel thereupon sought to impeach this testimony by entering into evidence a series of letters written by her to the petitioner, and these letters were inspected by the trial judge. (R. 254). The court refused to admit the letters into evidence because the letters were not relevant to the preceding inquiry of the witness (R. 254, 256). The most specific proffer made by defense counsel was that one of the letters stated the witness was expecting a baby and felt "guilty about what she's done to the defendant." (R. 254). The court then refused to consider the witness an adverse and hostile witness, because her preceding testimony offered nothing for counsel to impeach. (R. 258). The court specifically found the witness had not taken a position adverse to the defendant/petitioner. (R. 258). On cross-examination the prosecutor elicited testimony from Linda Maness that the petitioner had slapped his child on a prior occasion as well as on the day in question, April 14, (R. 270-272), although the child was not suffering from additional injuries until she returned from her short trip to a store.

Defense counsel subsequently sought to call Dana Maness, petitioner's sister-in-law, (R. 322) and Ruth Maness, petitioner's mother. The testimony of both witnesses was excluded on the ground that petitioner was attempting at impeach his own witness, Linda Maness. Defense counsel proferred that Dana Maness would testify that she was party to a conversation at the victim's funeral in Tennessee in which Linda Maness said that petitioner did not touch the baby and that she did not know what happened on April 14, 1971, although she did not leave the baby alone and did not go to the store. (R. 324). Counsel proferred that Ruth Maness would testify she found "some bloody baby blankets" in petitioner's home which Linda Maness explained as having been her own blood. (R. 325).

III

Florida's long standing evidentiary rule concerning the impeachment of one's own witness is examined and explained at length in *Johnson v. State,* 178 So.2d 724 (Fla., 2d DCA, 1965). It appears from the authorities cited therein that at the time of this country's separation from England on July 4, 1776, no comprehensive rule on this subject could be deemed well settled. However, it is probable that a party could not then impeach his own witness by evidence of general bad character nor contradict him by other evidence nor prove he had made prior contradictory statements and thereby impeach him. Although some early cases held contrary, the American common law rule did not prohibit one from contradicting his own witness in order to show the truth of the matter, if that party has been surprised or entrapped by the testimony of his witness; a split of authority developed as to the right of a party to prove that his witness made prior inconsistent or contradictory statements. Florida early followed the majority position, excluding such evidence unless the party was surprised or entrapped by his witness.

In 1861 Florida enacted a statute governing the impeachment of a witness by the party producing that witness, presently designated as Fla. Stat. § 90.09. As this statute was enacted as a declaration of the then existing American common law evidentiary rule, followed in this jurisdiction, it has been held by the Florida state courts that the statute should be interpreted in the light of that rule. *Johnson v. State, supra,* at 728. The right granted by the statute is a limited one, conditioned by the prerequisite that the introducing party be surprised or entrapped by the witness.

As stated by the court in *Foremost Dairies, Inc. v. Cutler,* 212 So.2d 37, 40 (Fla., 4th DCA, 1968):

> "One seeking to impeach his own witness under the statute can do so only when the party producing the witness has been surprised or entrapped by the statements made by the witness *from the stand,* and the testimony is not only not that which the producing party expected, but is in fact prejudicial to his case. Hernandez v. State, 1945, 156 Fla. 356, 22 So.2d 781."

In emphasizing that the test of surprise or entrapment must first be satisfied, the court refused to consider as surprise

the tactical strategy employed in the instant case, of putting a witness on the stand in anticipation that the resulting testimony will be adverse.

> "When we rule out Paul Lambert as a party so that the defendants in producing him as a witness can impeach him only by virtue of the statute, defendants must then meet the test as stated in Hernandez v. State, supra, and show surprise or entrapment. A party will not be permitted to put a witness on the stand knowing that his testimony will be adverse and then claim surprise in order to impeach such witness. This is particularly true when the procedure is nothing more than a device or artifice to get into evidence before the jury that which would otherwise be inadmissible."

Id. at 40.

The test of requisite adversity in the position of the witness has been that the witness not only fail to give beneficial testimony but also become adverse by giving evidence that is prejudicial to the party producing him. Florida has consistently held that a party cannot impeach his own witness merely because he failed to testify as to beneficial facts. *Gibbs v. State,* 193 So.2d 460 (Fla., 2d DCA, 1967).

Thus, at the time of petitioner's trial and appeal thereafter, the evidentiary law in the state courts of this jurisdiction was well settled and a source of long standing reliance. See *Adams v. State,* 34 Fla. 1851, 15 So. 905, 908 (1894); *Rowe v. State,* 174 So. 820 (Fla., 1937); *Hernandez v. State,* 22 So.2d 781 (Fla., 1945).

Assuming arguendo, as petitioner contends, that *Chambers v. Mississippi,* —— U.S. ——, 93 S.Ct. 1038, 35 L. Ed. 2d 297 (1973), as applied to the facts of the instant case, would render as proper the impeachment of his own witness, respondent would respectfully submit that petitioner has not exhausted his presently available state remedies and has prematurely sought the Writ. Petitioner has by-passed the one state remedy primarily intended to rectify errors predicated on constantly evolving constitutional concepts, Rule 3.850 Fla. R.Cr.P.

Petitioner principally relies upon *Chambers v. Mississippi, supra.* His appeal to the state District Court of Appeal was decided May 30, 1972, while the decision in *Chambers* was not handed down until February 21, 1973. Pe-

titioner is thereby seeking review before this court on a constitutional basis of evidentiary trial error, the authority for which was never available to the state courts at the time of their contact with the instant cause. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967), the case of petitioner's principal reliance on direct appeal, held the right to compulsory process for obtaining witnesses was violated by an arbitrary state rule prohibiting an alleged accomplice from testifying as to events he had personally observed, although that same witness was not prohibited from testifying for the prosecution. It was not at all clear that the court was also condemning a state's reliance on evidentiary rules excluding impeachment of *either* party's own witness by prior inconsistent statements, where the evidence sought to be admitted was not testimony of events personally observed but hearsay statements related to the impeaching witness.

The petitioner's presently available and compelling state remedy is Rule 3.850 Fla. R. Cr.P. The rule was promulgated expressly as a remedy for constitutional errors at the trial level which became apparent in the aftermath of decisions of the United States Supreme Court in *Gideon v. Wainwright* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) and other decisions. *State v. Wooden,* 246 So.2d 755 (Fla., 1971). The Rule was issued:

> "To establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts. . . . The rule is intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack."

Roy v. Wainwright, 151 So.2d 825 (Fla., 1963). In *Harris v. Wainwright,* 406 F.2d 1, 7 (5th Cir., 1969) the court noted the special utility of the Florida post-conviction remedy in allowing the state to vindicate expanding constitutional doctrines.

It is clear that the state courts bear the responsibility "to vindicate federally guaranteed, federally protected rights in the administration of justice," *Peters v. Rutledge,* 397 F.2d 731 (5th Cir., 1968). Although the requirement of exhaustion of available state remedies is based upon the principle of comity rather than jurisdictional limitation, *McIntyre v.*

New York, 329 F.Supp. 9 (D.E.D., 1971); *Bell v. Alabama,* 367 F.2d 243, 248 (5th Cir., 1966) cert. den. 386 U.S. 916 (1969), due regard for this principle requires that the state court hierarchy be afforded the initial opportunity to pass upon alleged claims of unconstitutional restraint. *Fay v. Noia,* 372 U.S. 391, 419-420 (1963). There is, of course, no requirement that the petitioner file repetitious applications in the state courts. Yet, the subsequent and intervening expression of the United States Supreme Court in *Chambers, supra,* renders petitioner's present claim so clearly distinct from the claim he has earlier presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim. See *Humphry v. Cady,* 450 U.S. 504, 31 L.Ed. 2d 394, 407, Footnote 18, 92 S.Ct. 1048 (1972).

Although petitioner correctly states that a Florida criminal defendant is not normally permitted to raise in a post-conviction proceeding pursuant to Rule 3.850 a point of law which has been raised and decided in his direct appeal, the instance of subsequently established error (or the comparable situation of expanding constitutional doctrines as here alleged) will not bar Rule 3.850 review, and relief, regardless of direct appeal proceedings. *Burse v. State,* 175 So.2d 586 (Fla., 3rd DCA, 1965); *Reddick v. State,* 190 So.2d 348 (Fla., 2d DCA, 1966); *Roy v. Wainwright, supra.* Respondent does not here suggest the filing of a "repetitious application" *Brown v. Allen,* 344 U.S. 443, or the "mere possibility of success in additional proceedings" *Roberts v. LaVallee,* 389 U.S. 40 (1967), but that if *Chambers v. Mississippi,* is controlling of the instant course, it represents the first clear mandate that existing accepted state practice is deficient, and warrants that the state courts have the initial opportunity of compliance with the High Court's ruling.

IV

Should this Honorable Court find that petitioner has suitably exhausted available state remedies the respondent would resist the assertion that *Chambers v. Mississippi,* compels granting a writ of habeas corpus on the facts of the instant case. Chambers was held to have been denied a fair trial because under the facts and circumstances of his case the ruling of the trial judge under the Mississippi hearsay rule, and the state's "voucher" rule, critical evi-

dence was denied the defense. There, a third pesron on different occasions actually confessed to the crime with which *Chambers* was charged under circumstances, although extrajudicial, which bore substantial assurances of trustworthiness. That same person then made and later repudiated a written confession of the same crime. The trial judge excluded the testimony of the persons to whom the oral confessions were made and also prohibited cross examination of the confessor.

In petitioner's case the extrajudicial hearsay conversations sought to be introduced by the defense bore none of the "persuasive assurances of trustworthiness" found in Leon Chambers' case. In fact, the proffers of Ruth and Dana Maness' testimony are not admissions against interest and can in no way be buttressed by that assurance of reliability. Dana Maness at best would have testified, not that Linda Maness admitted culpability for the offense, but only that she *did not know* what happened, although petitioner did not touch the baby. (R. 324). The evidence of both these witnesses, as opposed to those in Chambers, were thus traditionally inadmissible as lacking the conventional indicia of reliability.

V

Should this Honorable Court reject respondent's above argument and find *Chambers v. Mississippi* controlling on the facts of the case at bar, respondent would respectfully submit that *Chambers* should not be given retroactive application.

In deciding whether a newly adopted constitutional ruling should apply retroactively, the United States Supreme Court has considered three factors:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Desist v. United States, 394 U.S. at 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969).

In *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966), holding the right to counsel at interrogation announced in *Escobedo v. Illinois,* 378 U.S. 478 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964), and the right against

self-incrimination announced in *Miranda v. Arizona,* 384 U.S. 346, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), were not given retroactive application, the court stressed that the question of possible retroactivity is not automatically determined by the provision of the constitution on which the dictate is based, but is strongly influenced by reliance on past decisions and the impact on the administration of justice. 384 U.S. at 731. More recently in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) the court reiterated its previous position in *Johnson v. New Jersey* that reliance on prior decisions and the impact of retroactivity upon the administration of justice are the controlling factors in determining whether to give a new decision retroactive application. This point is stressed in *Prospective or Retroactive Operation of Overruling Decision,* 10 A.L.R.3d 1371 § 3(a):

> "Although the courts have given attention to various factors in determining whether or not to apply an overruling decision retroactively, it appears that the factor of reliance has received the most attention."
>
> (*Id.* at 1379)

Compare earlier annotation, 14 L.Ed.2d 933.

Florida's reliance on previously well established and long standing evidentiary rules has been set forth *supra.* To grant post-conviction relief to those tried prior to *Chambers* and in reliance on Florida and American common law would have a seriously disruptive affect on the administration of justice.

WHEREFORE, based upon the foregoing reasoning and authority it is respectfully submitted that the Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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[Certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-1664-CIV-PF

FILED DEC. 18, 1973

JOSEPH I. BOGART
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

GARY MANESS

v. } ORDER OF DISMISSAL

LOUIE L. WAINWRIGHT

Gary Maness has filed a Petition for Writ of Habeas Corpus attacking a twenty year sentence imposed on October 5, 1971, in the Criminal Court of Record in and for Dade County, Florida (now the Circuit Court). The sentence was imposed after a trial by jury resulted in a guilty verdict for manslaughter, *i.e.,* assaulting his daughter, Misty L. Maness resulting in her death.

As grounds for relief the petitioner alleges that various evidentiary rulings by the trial judge thwarted the petitioner in his attempt to present his defense to the extent that he was deprived of a fundamentally fair trial and due process of law.

Examination of the state court records, including the transcript of the trial, reveals the following: During the early evening hours of April 14, 1971, the petitioner and his wife, Linda Maness, brought their infant daughter Misty to the hospital at the United States Air Force Base, Homestead, Florida. The child was treated by Carl Sturge, a physician with a rank of Lieutenant Colonel. The doctor testified that the child was completely comatose. There were multiple body and facial injuries including multiple bruises about the face, an eye that was swollen closed, multiple bruises about the cheeks, shoulders, collarbone, chest and lower extremities. It was later determined that the child had a spiral fracture of the left arm and a healing fracture of the right thigh. Dr. Sturge asked the petitioner how the child sustained these injuries. Petitioner replied that the child had a habit of beating herself against the side

of the crib and hitting herself with her baby bottle. After Dr. Sturge advised petitioner that the child could not have inflicted such injuries upon herself, the petitioner replied, "we didn't have anything to do with it." The child was taken that evening by ambulance to Jackson Memorial Hospital where she died four days later.

The petitioner was arrested on April 26, 1971, by Sergeant Marshall Frank, Dade County Public Safety Department, and charged with the homocide of his daughter. Shortly after his arrest petitioner gave Sergeant Frank a sworn signed statement. In that statement the petitioner stated that during the afternoon hours of April 14, 1971, his wife had gone to the store and he was alone with his daughter; that the child started crying and when she wouldn't stop crying he "slapped her twice" in the jaw; that after his wife returned from the store she called petitioner into the child's room where he observed that the child "was pale and real limp and she had two bruises on her cheek . . ."

At his trial the petitioner repudiated his signed sworn statement. He testified that he made the statement because the officers told him that his wife would be arrested and lodged in the Dade County Jail unless he confessed. He also testified that his wife had told him that she was pregnant, and that he made the statement to Sergeant Frank to protect his wife and keep her from being arrested. Petitioner asserted at the trial that in fact his wife had never left him alone with the baby on the day in question, and that he did not inflict any injuries upon his daughter. Petitioner did not accuse his wife of inflicting the fatal injuries, but denied that that he did so.

The petitioner called his wife as a defense witness. He requested permission from the trial judge to treat her as an adverse or hostile witness so that he could cross-examine her, but this was denied. Petitioner then sought to elicit from his wife an admission that she had lied when she had told the officers she had gone to the store during the afternoon hours of April 14, 1971 and left the petitioner with their daughter. Petitioner was precluded from doing so when the trial judge ruled that it was improper to allow petitioner to impeach or discredit his own witness.

Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she

was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness.

Finally petitioner attempted to present the testimony of his sister-in-law, Dana Maness, regarding admissions made to her by petitioner's wife that petitioner had not touched the baby; that she did not know what had really happened; and that she had never left her home during the afternoon hours of April 14, 1971. This testimony was excluded on the basis that it was hearsay.

Petitioner contends that these evidentiary rulings by the trial judge thwarted the presentation of his defense to the extent that he was deprived of a fundamentally fair trial and of due process of law. Petitioner relies on the recent Supreme Court decision in *Chambers v. Mississippi,* —U.S. —, 35 L.Ed.2d 297 (1973) to support his claim.

Petitioner's conviction was affirmed on direct appeal. *Maness v. State,* 262 So.2d 716 (Fla. App.3rd, 1972). One of the points raised by the petitioner in his direct appeal was "whether the trial court erred in excluding the testimony of Dana Maness thus denying defendant a fair trial, violating his right to due process of law. . . ."

The respondent makes three contentions: First, that petitioner has not fully exhausted his state remedies. Second, that assuming exhaustion, *Chambers v. Mississippi, supra,* does not compel habeas corpus relief to petitioner. Third, that *Chambers* was decided after petitioner's conviction became final and should not be applied retroactively.

Respondents failure to exhaust claim is based on the proposition that *Chambers* was decided after petitioner's direct appeal and involved new constitutional considerations unavailable to the Florida courts at the time petitioner's case was decided. Respondent contends that the exhaustion doctrine requires that this Court should refrain from any consideration of the merits of petitioner's claim until the Florida courts are first presented an opportunity to consider the applicability to petitioner's case of the constitutional principles discussed in *Chambers.*

If *Chambers* did establish new principles of constitutional law respondent's position would be valid. See *Picard*

v. Conner, 404 U.S. 270 (1971). But, it is clear that such is not the case. The Court in *Chambers,* specifically noted that it was not announcing any new constitutional principles.

> "We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. *In reaching this judgment we establish no new principles of constitutional law.* Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Chambers v. Mississippi,* —U.S.—, 35 L.Ed.2d at 313. (emphasis added).

It is the opinion of this Court that in his direct appeal the petitioner presented the Florida Appellate Court with a fair opportunity to apply the constitutional principles discussed in *Chambers* to the facts and circumstances of petitioner's case. See *Chambers, supra* at 305, footnote 3. (Even though *Chambers* was not a habeas corpus proceeding the Courts discussion in footnote 3 of the opinion is relevant here.)

Having concluded that petitioner has fully exhausted his state remedies the Court now proceeds to a discussion of the merits of petitioner's contention. Because *Chambers* does not establish any new constitutional principle no consideration need be given to respondent's claim that *Chambers* should not be given retroactive application.

In *Chambers* the defendant was convicted of the murder of a policeman named Liberty. At the trial the evidence that was presented tended to show that on June 14, 1969, in a small town in Southern Mississippi, Liberty, along with another officer entered a local bar and pool hall to execute a warrant for the arrest of a youth named Jackson. Jackson resisted and a hostile crowd of some fifty or sixty persons gathered causing a commotion. During this commotion Liberty was shot several times in the back. Before he died Liberty shot his 12-gauge sawed-off shotgun into

an alley in the area from which the shots appeared to come from. The defendant, Chambers, was hit by Liberty's shots and survived only to be charged with Liberty's murder.

The following November, one McDonald, who had been present the night that Liberty was killed, gave Chambers' attorneys a sworn confession that he had shot Liberty. In this confession McDonald also stated that he had told a friend, James Williams, that he (McDonald) shot Liberty. McDonald was arrested but one month later at his preliminary hearing he repudiated his confession. McDonald claimed that a Reverend Stokes had persuaded him to confess; that he had not been at the scene when Liberty was shot; and that he did not shoot Liberty.

At his trial Chambers attempted to defend himself by showing that it was McDonald that had shot Officer Liberty. He presented two witnesses who were present on the night in question, who implicated McDonald in the murder of Liberty. Chambers also called McDonald as a witness and laid a predicate for the introduction of his (McDonald's) sworn out-of-court confession and read it to the jury. On cross-examination by the State, McDonald testified that he had renounced his prior confession. Chambers then requested the court to allow him to cross-examine McDonald as an adverse witness so that he could challenge McDonald's renunciation of his confession. The court denied this request ruling that McDonald did not qualify as an adverse witness. Chambers then attempted to introduce the testimony of three witnesses to whom McDonald had allegedly admitted that he had shot Liberty. The testimony of these witnesses were excluded as hearsay.

The Supreme Court concluded that the evidentiary rulings which precluded Chambers from cross-examining McDonald and presenting witnesses who would have discredited McDonald's repudiation of his confession and demonstrate his complicity in the murder of Liberty, "denied him a trial in accord with traditional and fundamental standards of due process." *Chambers, supra* at 313.

Although there are striking similarities in the facts and circumstances of *Chambers* and the instant case, the distinction between the two are so significant that the result must necessarily differ. First, it is important to note that no single evidentiary ruling in *Chambers* constituted a

denial of due process of law. Clearly, it was the totality of rulings that resulted in the conclusion that he was thwarted in his attempt to present his defense to the extent that he was denied a fundamentally fair trial.

The crucial distinction between *Chambers* and this case is that the petitioner's defense did not include an accusation, and there is no substantial evidence to show, that petitioner's wife committed the crime for which petitioner was convicted. She never admitted having anything to do with the child's death. There was no witness who implicated the wife in the crime.

Petitioner was not prevented from presenting any evidence which would have tended to show that his wife, and not he, had beaten the child. He obviously had none to present. Evidence that his wife made prior statements inconsistent with her in-court testimony, *i.e.*, that she told the petitioner she was pregnant; and that she was at the store during the time the child sustained the injuries resulting in her death, was neither relevant nor competent to prove that the petitioner's wife, and not the petitioner, was responsible for the child's death.

Petitioner's only defense was that *he* did not injure his daughter, and that his confession was untrue, and made to keep his pregnant wife from being arrested. His defense did not include an accusation that his wife was responsible for the child's death. Indeed, as stated before, there was no substantial evidence to support such an accusation. Petitioner's testimony at his trial contains the following colloquy:

> "Q Did you tell Dr. Fogel that the child had beat its head against the crib and with the bottle?
> A I believe I did, sir.
> Q Was that the truth?
> A As far as I know.
> Q Are you telling the jury that's how the baby died, by hitting its head against the crib and with the bottle?
> A As far as I know it is, sir."
> TR. at page 315.

In the final analysis, therefore, it is clear that the evidentiary rulings by the state trial judge did not preclude the introduction of any evidence that was supportive of a defense offered by the petitioner.

In *Chambers,* however, in addition to the defense that Chambers did not shoot Liberty, Chambers affirmatively attempted to show that it was McDonald who shot Liberty. It was this latter defense that was thwarted by the trial court's evidentiary rulings. There were two independent eye-witnesses to Liberty's death, who implicated McDonald in the slaying, a confession by McDonald (not with-standing a later renunciation) and three witnesses to whom McDonald had admitted that he shot Liberty. In sum, Chambers was precluded from bolstering his second defense that McDonald, and not he, shot Liberty.

In conclusion it is the opinion of the Court that the complained of evidentiary rulings of the state trial judge did not have the effect of thwarting any defense theory the petitioner sought to assert. Petitioner, therefore, was not deprived of a fundamentally fair trial and of due process of law.

Thereupon, it is

ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is hereby DISMISSED.

DONE AND ORDERED at Miami, Florida, this 18th day of December, 1973.

PETER FAY
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO: 73-1664-CIV-PF

GARY MANESS, Petitioner, vs. LOUIE L. WAINWRIGHT, ETC., Respondent.	MOTION FOR RECONSIDERATION OR ALTERNATIVELY FOR CERTIFICATE OF PROBABLE CAUSE AND MEMORANDUM IN SUPPORT THEREOF

Petitioner, GARY MANESS, by his undersigned counsel, hereby moves this honorable court for reconsideration of its order of dismissal dated December 18, 1973, or in the alternative, requests that this honorable court issue a certificate of probable cause to facilitate his appeal to the Circuit Court of Appeals for the Fifth Circuit. In support hereof the petitioner would respectfully submit unto this honorable court:

I. *THE DISTRICT COURT'S INTERPRETATION OF THE HOLDING IN CHAMBERS V. MISSISSIPPI IS UNDULY NARROW.*

The district court's order, although finding that "there are striking similarities in the facts and circumstances of *Chambers* and the instant case . . ." concludes that "the complained of evidentary rulings of the state trial judge [in the instant case] did not have the effect of thwarting any defense theory the petitioner sought to assert." *Order,* at 7, 8. This conclusion is based upon an unduly narrow interpretation of *Chambers* and must fail.

GARY MANESS' defense was simply that he was innocent of the charges against him. An integral part of the defendant's efforts to establish a reasonable doubt in the minds of the jurors was to show that the defendant's wife, LINDA MANESS, who was the *only* other suspect in the case, had engaged in a pattern of lying regarding the death of their daughter. The defendant attempted to show that LINDA MANESS' versions of the chain of events on the day of her baby's death were multiple and conflicting, and that LINDA MANESS had written the petitioner

letters which stated clearly that he had not perpetrated a crime and that she felt very guilty about what she was doing to him. The trial court precluded the petitioner from presenting these integral elements of his defense on the ground that the defendant could not impeach his own witness. Clearly, this series of rulings (together with the court's refusal to allow the testimony of DANA MANESS and RUTH MANESS) thwarted the defendant in his effort to establish a reasonable doubt concerning his guilt in the minds of the jurors. In sustaining the state trial judge's rulings in the instant cause (which rulings were based on the theory of the "voucher rule" which was striken in *Chambers*), the district court has overlooked the entire thrust of the *Chambers* decision, which is:

> Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. *Chambers v. Mississippi,* 93 S.Ct. 1038, 1046 (1973).

The district court's opinion is based on a finding that in the instant case the defendant did not explicitly accuse his wife of being the murderer, and that therefore this case is not controlled by *Chambers*. Although the defendant did "accuse" his wife (see II, *infra*), it is clear that the rationale of the *Chambers* decision does not require this. The district court, in its order, cited no authority whatsoever in support of its narrow interpretation of the *Chambers* case. Those reported decisions which do exist, clearly indicate that the *Chambers* ruling is not to be so narrowly interpreted.

In *United States v. Torres,* 477 F.2d 924 (9th Cir. 1973) the Ninth Circuit applied the *Chambers* rationale and reversed a conviction where the trial judge had precluded the defense from impeaching its own witness. Torres, who was charged with importing and possessing cocaine and heroin, called as a defense witness an Anselmo Lebron, the man who was in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket (in which the drugs were found) had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's

testimony by introducing his (Lebron's) prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent surprise, one may not impeach his own witness. The Ninth Circuit, citing *Chambers,* reversed the conviction and held:

> It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the Court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres. . . . 'The rule against impeaching a party's own witness [is] a pointless limitation on the search for truth.' *United States* v. Torres, 477 F.2d at 925.

It is very significant that the witness in the Torres case, as in the case at bar, had *not* confessed to the crime with which the defendant was charged, but the court nonetheless applied the *Chambers* rationale to reverse the conviction. The *Torres* court, in rejecting the rule against impeaching a party's own witness, specifically ruled that denying the defendant the right to show that the witness was or had reason to be untruthful impermissibly interfered with the defendant's efforts to persuade the jury of a reasonable doubt of his innocence.

In the *Freeman* case, cited with approval in *Torres,* the Second Circuit stated:

> That a party may show by other witnesses or evidence that the facts were not as his witness had said is now universally accepted. . . . We do not limit our repudiation of the pernicious rule against impeachment of one's witness to instances in which the witness is an "adverse party" or "hostile." The search for truth is not to be confined by any such limitation. . . . The trial judge's comments about impeaching one's own witnesses were erroneous and ill-advised. *United States v. Freeman,* 302 F.2d 347, 351-52 (2d.Cir.1962).

The state trial court in the instant case:

1. Prevented the defendant from cross-examining Linda Maness (the only other suspect to the crime) regarding her knowledge that Gary Maness was innocent, and prevented

the defendant from showing that her in-court testimony differed greatly from extra-judicial statements regarding the death of the baby;

2. Prevented the defendant from showing that LINDA MANESS had written letters which contained, *inter alia* statements to the effect that the defendant was innocent and that she was sorry for what she had done to him;

3. Precluded the defendant from calling RUTH MANESS, who would have testified that LINDA MANESS' in-court statements significantly differed from her extra-judicial statements;

4. Prevented the defendant from calling DANA MANESS who would have testified that LINDA MANESS made extra-judicial statements to the effect that GARY MANESS was innocent of the charges against him.

Clearly, the totality of these rulings, all of which were based upon the rule that the defendant may not impeach his own witness ("voucher rule") served to thwart the defendant in his efforts to establish a reasonable doubt concerning his guilt in the minds of the jurors. The petitioner attempted to show that the only other suspect had made a series of untruthful statements and, in addition had made statements exculpatory of the petitioner. The strong implications of this showing would have been that LINDA MANESS and not GARY MANESS was the perpetrator of the crime.

II. *ASSUMING ARGUENDO (BUT NOT CONCEDING) THAT THE DISTRICT COURT'S NARROW INTERPRETATION OF THE CHAMBERS CASE IS CORRECT, THE DISTRICT COURT'S FINDING OF FACT (THAT THE PETITIONER DID NOT ACCUSE HIS WIFE) IS WITHOUT BASIS IN THE RECORD AND IS ERRONEOUS.*

The district court bottomed its entire decision on the fact that "the petitioner's defense did not include an accusation. . . . that petitioner's wife committed the crime for which petitioner was convicted." This finding, in light of the totality of the record, is clearly erroneous.

To begin with, the instant Petition alleged at page 2: "The crucial issue at petitioner's trial was whether it was the petitioner who had beaten the child to death or whether it was petitioner's wife, LINDA MANESS, who had actually committed the offense." The state, in its response, did not

traverse this allegation, and accordingly it should be taken as true for the purposes of the instant litigation.

More importantly, a close examination of the trial testimony results in the irrefutable conclusion that a significant aspect of the petitioner's defense was to cast the shadow of guilt upon his wife.

"LINDA MANESS

was called as a witness on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MINKUS:

Q. Did you ever tell——

THE COURT: May we have her name and address——

MR. MCWILLIAMS: Objection.

THE COURT: ——on the record?

Q. (By MR. MINKUS) What is your name and address, for the record?

A. Mrs. Gary Maness, 225 Harvard Avenue, El Paso, Texas.

MR. MINKUS: At this particular time, Judge, I would like to be able to question the witness as an adversary and hostile witness.

THE COURT: Denied. There's no showing.

Q. (By MR. MINKUS) Did you ever have a conversation——

MR. MCWILLIAMS: Objection.

THE COURT: Sustained.

Q. (By MR. MINKUS) Did you ever tell Mrs. McClain——

MR. MCWILLIAMS: Objection.

THE COURT: Too leading?

MR. MCWILLIAMS: No, Judge. He's trying to impeach a witness he hasn't asked any questions on direct yet. It's an improper predicate.

THE COURT: Well, objection sustained to leading.

I don't know. He has not asked the rest of the question. I don't know whether he's impeaching or not.

Q. (By MR. MINKUS) *Did you kill your baby?*
A. No, I did not.
Q. *Did you ever strike your baby*——
A. No, I didn't.
Q. ——in the face?
A. No.
Q. And in the head?
A. No.
Q. *Isn't it a fact that you know that your husband, Gary Maness*——

MR. MCWILLIAMS: Objection.

Q. (By MR. MINKUS) ——*did not*——

MR. MCWILLIAMS: Objection, Judge.
THE COURT: Sustained.
MR. MCWILLIAMS: Counsel, it's your witness.
MR. MINKUS: Yes, she is an adverse, hostile witness.
MR. MCWILLIAMS: Objection to those statements. I move they be stricken. Ask the jury to disregard it.
THE COURT: Objection sustained. Stricken." (Emphasis added) TR 245-47.

It is unfair in the extreme to deny the petitioner present relief because he did not specifically accuse his wife, when the trial judge frustrated his every effort to impeach his wife. Had the petitioner been permitted to undertake the desired impeachment, the explicit "accusation" required by the district court may have materialized. This court should not now penalize the petitioner for not doing what he was forbidden to do by the state trial judge.

The district court's opinion cites certain testimony of the petitioner as supportive of its ruling that the petitioner was not accusing his wife of the killing and therefore *Chambers* did not apply. The court cited the following:

Q. "Are you telling the jury that's how the baby dies, by hitting its head against the crib and with the bottle?
A. As far as I know it is, Sir." TR at page 315. The court *failed* to cite that later in his testimony the petitioner explained that this was his belief *only because* this is what his wife had told him.
Q. "Now, when you say you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said, "That's as far as I know," how do you know that's how it happened?

A. *Because Linda told me*
Q. When did she tell you that?
A. *When I asked her how she* [the baby] *got the bruises."* TR 317-318. (Emphasis added).

There were only two conceivable suspects in the instant case, GARY MANESS and his wife, LINDA. The entire thrust and the obvious implications of defense counsel's proffers were to show that LINDA MANESS had perpetrated the crime. To now deny defendant relief on the grounds that he did not utter the words "my wife did it" is to create an artificial distinction between the present case and *Chambers*.

In light of the instant record, it cannot reasonably be said that the petitioner was not affirmatively attempting to show that it was his wife and not he who killed the baby. The district court's statement that "It is clear that the evidentary rulings by the state trial judge did not preclude the introduction of any evidence that was supportive of a defense offered by the petitioner" has no basis whatsoever in the present record.

WHEREFORE, petitioner respectfully prays that this honorable court will reconsider and withdraw its order of dismissal or alternatively issue a certificate of probable cause to facilitate petitioner's appeal to the Fifth Circuit.

Respectfully submitted,

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By: Albert G. Caruana
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[Certificate of service omitted in printing]

peals, Lewis R. Morgan, Circuit Judge, held that the prisoner was not denied due process of law by the state trial court's application of the Florida voucher rule to prevent his cross-examination of his wife whom he called as a witness nor was he denied due process by the exclusion of evidence impeaching his wife.

Affirmed.

Clark, Circuit Judge, dissented and filed opinion.

1. Constitutional Law ⇐268(2)

Accused in state manslaughter trial was not denied due process of law because, under Florida "voucher" rule, he was not permitted to cross-examine his wife whom he called as a defense witness where the proffered testimony was that neither the accused nor his wife knew what caused their infant daughter's death, there was no positive indicia of the reliability of certain hearsay testimony and the accused's theory concerning the infant's death was unrealistic. U.S.C.A.Const. Amend. 6.

2. Constitutional Law ⇐266(1)

Accused in state manslaughter trial was not denied due process of law because hearsay testimony of his sister-in-law concerning statements by the accused's wife which contradicted her trial testimony was excluded where there was no indicia of reliability of the hearsay testimony and such testimony was offered by a close relative. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐385

State evidentiary rules need not be mirror images of evidentiary rules applied in the federal courts in order to pass constitutional muster. Fed.Rules of Evidence, rule 607, 28 U.S.C.A.

4. Constitutional Law ⇐257, 266

Due process clause permits statewide latitude in fashioning rules of evidence and procedure.

Gary MANESS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Director, Division of Corrections, Respondent-Appellee.

No. 74-1538.

United States Court of Appeals, Fifth Circuit.

April 25, 1975.

Rehearing En Banc Granted Sept. 2, 1975.

State prisoner filed petition for writ of habeas corpus, attacking his conviction for manslaughter by the State of Florida. The United States District Court for the Southern District of Florida, Peter T. Fay, J., denied relief and the prisoner appealed. The Court of Ap-

Albert G. Caruana, A.C.L.U. of Fla., Bennett H. Brummer, Asst. Public Defender, Miami, Fla., for petitioner-appellant.

J. Robert Olian, Asst. Atty. Gen., William L. Rogers, Asst. Atty. Gen., Miami, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN and CLARK, Circuit Judges, and GORDON, District Judge.

LEWIS R. MORGAN, Circuit Judge:

Petitioner-appellant Gary Maness filed a petition for a writ of habeas corpus, attacking his conviction for manslaughter by the state of Florida. He complains solely that he was denied due process of law by the state trial court's application of the voucher rule to prevent his cross-examination of a witness called by him, and to exclude evidence impeaching that witness. Under the voucher rule, a party calling a witness "vouches" for that witness' credibility, and therefore may not attack it. We find no denial of due process in the state court's application of Florida's evidentiary rules, and we affirm the district court's denial of the petition.

I.

Maness was convicted of manslaughter in the death of his infant daughter, Misty, who died as a result of injuries which included multiple bruises and fractures of her left arm and right thigh. After an investigation, Maness was arrested for his daughter's death. He made a sworn statement that he had struck Misty twice on the afternoon before he and his wife had taken her to the hospital for treatment of the injuries from which she died four days later. He also stated that this had occurred while Linda, his wife, was on a brief shopping trip.

At trial, Maness recanted his confession, and testified that he had confessed only to keep his wife, whom he believed to be pregnant, from going to jail. He also testified that he did not know how Misty had been injured, but that he believed the injuries were self-inflicted.

The issue in this appeal revolves around the trial testimony of Linda Maness. Linda was not called as a witness for the state. Petitioner Maness therefore called her as a defense witness, and immediately sought to treat her as an adverse witness so that he could cross-examine and impeach her. The trial court ruled that she was not an adverse witness and therefore, under the Florida voucher rule, Maness could not impeach her testimony. Linda testified that she had gone shopping on the afternoon in question and returned to find the child injured. She also testified that she did not know how Misty had sustained her injuries.

Maness sought to introduce three items of evidence, all of which were excluded, in order to contradict Linda's testimony. First, he sought to introduce some letters written to him by his wife in which she allegedly stated that she knew Maness had not killed Misty, and that she had not gone to the store on the afternoon in question.[1] Second, Maness attempted to call his sister-in-law, Dana Maness, to testify that Linda had made statements to her exculpating Maness (but not inculpating herself). Third, Maness also attempted to have his mother testify as to an out-of-court statement made by Linda to her, which he hoped would cast doubt on Linda's credibility by contradicting one detail in her testimony. All of this evidence was excluded by the state trial court on the authority of the Florida voucher rule.[2]

1. The letters from Linda Maness which were proffered at trial were not submitted with the petition for a writ of habeas corpus filed by Maness in the district court below. The district court found that in the letters written by Linda, "she *allegedly* admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971." (Emphasis added.)

2. In its findings of fact, the district court stated that the exclusion of Dana Maness' testimony was based upon the hearsay rule.

II.

Maness grounds his case for federal habeas corpus relief upon the single case of Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), which held that a Mississippi trial court's rigid application of that state's voucher and hearsay evidentiary rules had resulted in a denial of due process. Maness argues that factual parallels between his case and *Chambers* demand the same result here.[3]

Chambers was convicted of murdering a policeman who was killed in the aftermath of a barroom brawl involving a sizeable crowd. After chambers' arrest, another man, Gable McDonald, made a confession to police which he later repudiated. At Chambers' trial, there was little hard evidence that Chambers had shot the officer, and part of Chambers' defense was to show that it was in fact McDonald who had committed the crime. Since the state did not call McDonald, Chambers had to call him as his own witness. He introduced McDonald's written confession, but on cross-examination by the state, McDonald repudiated it as having merely been part of a scheme initiated by one Stokes to get Chambers out of jail, whereupon they would all share in the proceeds of a lawsuit Chambers would bring against the city. Since McDonald had been called by the defense, he could not be cross-examined by Chambers' attorney under the Mississippi voucher rule, which is for all practical purposes identical to the voucher rule of Florida whose application is challenged here by Maness. Furthermore, Chambers offered three different witnesses who would have testified that McDonald had admitted that it was he, not Chambers, who shot the officer. None of these three out-of-court confessions was allowed into evidence under the Mississippi hearsay rule which does not recognize admissions against penal interest as an exception to the hearsay exclusion. Thus the combined effect of the Mississippi hearsay and voucher rules prevented Chambers from introducing testimony which strongly implicated McDonald, rather than Chambers, as the guilty party.

Maness has argued that *Chambers* should be read as holding that the voucher rule cannot be applied in a state criminal proceeding if it operates to hamper the defendant's development or presentation of a defense theory. Maness also recognizes that the holding in *Chambers* was closely tied to the facts in that case, but asserts that there is no appreciable difference between his case and Chambers', if his interpretation of *Chambers*, stated above, is correct.

We believe, however, that the interpretation of *Chambers* offered by Maness is too broad. The Supreme Court did question the wisdom of the common law voucher rule in the context of criminal trials, particularly in the situation faced by Chambers: a witness vital to the defense yet unlikely on direct examination to give favorable defense testimony could be brought to the witness stand only by the defense's foregoing the ability to cross-examine and impeach that witness. However, the Court did not base its reversal of Chambers' conviction on a violation of his Sixth Amendment right to confront the witnesses against him. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Rather, the Court concluded that a combination of the voucher rule and the hearsay rule, as applied, "denied [Chambers] a

The briefs of both parties on appeal, however, point out that the state trial court excluded her testimony on grounds of the voucher rule. Our disposition of Maness' contentions would be the same, however, whether the exclusion was based upon voucher or hearsay; hence we find it unnecessary to determine whether the district court's finding of fact was "clearly erroneous."

3. Maness was convicted on October 5, 1971. *Chambers, supra*, was decided by the United States Supreme Court on February 21, 1973. The district court determined that there was no question of the retroactivity of *Chambers* because the Supreme Court stated that it was announcing no new principle of constitutional law. *Chambers, supra*, 410 U.S. at 302, 93 S.Ct. 1038. In affirming the district court's denial of habeas corpus relief to Maness, we express no view on the question of *Chambers*' retroactivity.

trial in accord with traditional and fundamental standards of due process." *Chambers, supra*, 410 U.S. at 302, 93 S.Ct. at 1049. In reaching this conclusion, the Court carefully and extensively pointed out that the hearsay statements excluded from Chambers' trial were "made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Chambers, supra* at 300, 93 S.Ct. at 1048. The cumulative effect of the trial court's rulings rendered Chambers' defense "far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted." *Chambers, supra* at 294, 93 S.Ct. at 1045.

It is apparent from a reading of the Supreme Court's opinion that Chambers' trial was a palpable miscarriage of justice. The state court had excluded evidence that strongly pointed the finger of guilt at McDonald while the evidence against Chambers was minimal. Furthermore, McDonald's inculpation spelled Chambers' exculpation, since the state's evidence precluded the theory that more than one person was responsible for the killing. *Chambers, supra* at 297, 93 S.Ct. 1038.

[1] We cannot read *Chambers* as broadly as Maness would have us, because the Court explicitly stated, "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedure." *Chambers, supra* at 302, 93 S.Ct. at 1049. If *Chambers* was intended to cast a pall of unconstitutionality upon all state voucher rules, it would have established a new principle of constitutional law. Likewise, if *Chambers* meant to suggest that due process is denied when the exclusion of defense evidence pursuant to long-standing rules of evidence results in a less persuasive defense, it would also have established a new principle of constitutional law.

In deciding this case on the basis of *Chambers*, we are presented with a question of degree: was Maness' defense "less persuasive" to such a degree that we must conclude that his right to a fair trial was violated? While Maness would argue that superficial factual parallels control the outcome, we believe it is necessary to closely examine the effect on his defense worked by the voucher rule's application.

The strongest point of Maness' argument is that he should have had the opportunity to subject Linda to cross-examination. *Chambers* held that an accused's Sixth Amendment right to confront witnesses "against" him is not strictly limited to the confrontation of witnesses called by the state. *Chambers, supra* at 297-98, 93 S.Ct. 1038. Chambers' inability, because of the voucher rule, to cross-examine McDonald was thus one prong of the Court's holding that Chambers had been denied due process. At Maness' trial, Linda testified that he had slapped Misty in the face on the day in question. In addition, her extrajudicial statement to Dana Maness and her letters to Maness, as well as Maness' own testimony (contrary to his sworn statement) put her present in the home during the period when Misty apparently sustained the fatal injuries. Maness' defense involved at least a veiled accusation that Linda, rather than he, inflicted the injuries. It would certainly have furthered "the integrity of the fact-finding process," *Chambers, supra* at 295, 93 S.Ct. at 1046, if Maness had been allowed to cross-examine her.

Secondly, there is the written evidence of the letters from Linda to Maness which purportedly contain material tending to exculpate Maness. Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. We note, however, that the state trial court initially excluded these letters because of their irrelevance to Linda's testimony; it also ruled that they did not contradict Linda's testimony that she was not at home on the after-

noon in question. Such a ruling is an indication that the content of the letters, when viewed in context, was less persuasively favorable to Maness' defense than the abbreviated allegation of their contents in the habeas petition.

[2] Thirdly, Maness points to the exclusion of the testimony of Dana Maness, to whom Linda allegedly admitted that Maness had not touched the baby, that Linda did not know what had happened and had not gone to the store during the afternoon in question. We are reluctant to attribute to this hearsay testimony from Maness' sister-in-law the same degree of trustworthiness and reliability which the Supreme Court found in the testimony of the three witnesses to whom McDonald confessed in *Chambers*. In *Chambers*, there was independent corroboration of McDonald's admission. Maness asserts that the out-of-court statements here have indicia of reliability. However, this assertion rests primarily upon the fact that Maness' testimony, his sister-in-law's proffered testimony and the letters which have not been made available to us all cross-corroborate each other.

Finally, there is the testimony of Ruth Maness, the petitioner's mother. She would have testified that Linda told her that some baby blankets found in the Maness home in the course of the police investigation had become bloodied as a result of Linda's menstrual period. This extrajudicial statement contradicts Linda's testimony that the source of the blood was the baby's cracked gum, thereby raising a question of Linda's overall credibility. Again, as with Dana Maness, we do not find in a close relative's testimony the "persuasive assurances of trustworthiness" cited by the Court in *Chambers, supra* at 302, 93 S.Ct. 1038.

The application of the voucher rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. However, the net effect of Linda's testimony, petitioner's own testimony, the excluded letters, and the proffered testimony of Ruth and Dana Maness is that neither petitioner nor Linda knew what caused Misty's death. Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in the head with her bottle. This trial record, our inability to find any positive indicia of the reliability of the hearsay testimony of Ruth and Dana Maness, and the unavailability of the letters for our inspection lead us to conclude that the voucher rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause.

[3, 4] The common law voucher rule has occasionally been the subject of criticism by the federal judiciary. *See Chambers, supra* at 295-97, 93 S.Ct. 1038; United States v. Prince, 491 F.2d 655, 659 (5th Cir. 1974); United States v. Torres, 477 F.2d 922 (9th Cir. 1973); United States v. Freeman, 302 F.2d 347 (2d Cir. 1962). Its demise in the federal courts is at hand; Rule 607 of the recently promulgated Federal Rules of Evidence, effective July 1, 1975 provides: "The credibility of a witness may be attacked by any party, including the party calling him." Nevertheless, it is clear that state evidentiary rules need not be mirror images of evidentiary rules applied in the federal courts in order to pass constitutional muster. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). "The due process clause has always been interpreted as permitting the states wide latitude in fashioning rules of evidence and procedure." Bassett v. Smith, 464 F.2d 347, 351 (5th Cir. 1972). *Chambers* has not altered this principle; indeed, it explicitly reaffirmed "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Chambers, supra*, 410 U.S. at 302, 93 S.Ct. at 1049. Under all the facts and circumstances, we simply cannot say that Maness was denied his right to a fair trial.

The judgment of the district court denying the petition for a writ of habeas corpus is

Affirmed.

CLARK, Circuit Judge (dissenting).

The divine plan that put the tender life of Misty Maness into the hands of her parents is both unknowable and incomprehensible. The distinction which the majority perceives between the proof wrongly excluded in Chambers v. Mississippi and that refused in the case at bar is almost as obscure to me.

The state's case against Gary Maness was predicated upon his confession. The defense was built upon its repudiation. Gary tried to show that he "took the blame" because of a concern for his wife Linda, enhanced by a belief that she was pregnant. Dana Maness, his sister-in-law, offered testimony which tended to exculpate Gary and corroborate his recantation. The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumed sole responsibility, subject to the implausible possibility of self-injury. Linda's letters and Dana's statements tended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida voucher rule which sanctified Linda's testimony from attack by Gary.

As I perceive the due process principle announced in *Chambers*, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. At a minimum, it seems to me that this case must be remanded for a determination of the authenticity and content of Linda's letters. If these were her letters and read as described, it further is my view that habeas corpus relief should be granted and Florida should be required to retry Gary in a fair proceeding which admits *all* of the facts in testing for the truth.

I respectfully dissent.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1538

GARY MANESS,
Petitioner-Appellant,

——VS——

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
Respondent-Appellee,

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Petitioner-Appellant, GARY MANESS, by his undersigned counsel, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Honorable Court for rehearing on the following grounds: As is set forth with specificity hereinafter, the opinion herein sought to be reviewed overlooks and misapprehends controlling points of law and fact crucial to a just determination of petitioner's claimed constitutional deprivations.

Further, the Petitioner-Appellant pursuant to Rule 35 of the Federal Rules of Appellate Procedure hereby respectfully suggests the appropriateness of Rehearing En Banc in this cause on the following grounds: This case (resulting in a split-decision) involves a question of exceptional importance and it is the first ennunciation by the United States Court of Appeals for the Fifth Circuit involving a direct interpretation of the Supreme Court Case of *Chambers v. Mississippi*, 93 S. Ct. 1038 (1973), reaching a result *opposite* of that of the United States Supreme Court on essentially the same questions of law and fact and a result inconsistent with cases involving the same questions of law and fact from other circuits.

FACTS

The salient facts of this case, set out with particularity in petitioner's main brief may be capsulized as follows:

Gary Maness, presently incarcerated in a Florida penal institution, was charged in 1971 with culpable negligence in causing the death of his daughter, Misty. At his trial, the Defendant attempted to establish that he was innocent of the charges and that there was reason to believe this his wife, the only other suspect to the crime, had committed the offense.

The petitioner testified at his trial that he had made an inculpatory extra-judicial statement to the police to protect his wife, Linda Maness, whom he thought was pregnant. Petitioner further testified that the statement he had previously given was one which had been agreed upon with his wife prior to their interrogation by the police and was not, in fact, the true version of what had happened. (Tr.291-297,250,310-311)

The state did not charge Linda Maness and at the Defendant's trial, failed to call Linda Maness as a witness in the state's case in chief. Petitioner's trial counsel was thus forced to call Linda Maness as a witness and immediately asked the court to declare the witness an adversary and hostile witness so that she could be cross-examined. The court refused to permit the defense to treat Linda Maness as an adversary and hostile witness. Linda Maness testified consistently with the state's position, and defense counsel's attempts to impeach her testimony, in which she, *inter alia,* denied striking the baby, were prohibited by the state trial court on the grounds that the defense would not be permitted to impeach its own witness (The Voucher Rule). (Tr.245-270) Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by Linda Maness to Gary while he was in jail awaiting trial. (Tr.252-260) These letters in effect tended to exculpate Gary Maness in that they stated, *inter alia,* that Gary Maness had not done the act with which he was charged. These letters are attached to a Motion for Leave to Supplement the Record Pursuant to Federal Rule of Appellate Procedure 10(c) filed simultaneously with the submission of this Petition for Rehearing and Suggestion for Rehearing En Banc.

Later in the Defendant's state court trial, the defense counsel called Dana Maness as a witness. (Tr.322) The state objected to her testifying on the grounds that it tended to impeach Linda Maness, whom the state argued was a defense witness and therefore could not be impeached by the defense pursuant to the Voucher Rule. This objection was sustained by the trial court. (Tr.323) Defense counsel then proffered to the court that Dana Maness would testify that while in Tennessee Linda Maness had had conversation with her in which she told Dana that Gary Maness did not touch the baby and that she did not know what happened, but that Gary Maness did not do what he had been charged with. (Tr.324) The state trial court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from impeaching his own witness. (Tr.323-324)

Defense counsel also attempted to call Ruth Maness, mother of the Defendant, but the state objected to her testimony (as proffered) on the grounds that it tended to impeach Linda Maness, a defense witness and therefore was improper under the state Voucher Rule. The trial court sustained the prosecution's objection. (Tr. 325)

The petition for habeas corpus relief alleged a deprivation of the Defendant's fundamental constitutional rights to due process of law as a result of:

1. The Defendant was precluded from cross-examining Linda Maness, the only other suspect to the crime, regarding her knowledge that Gary Maness was innocent, and prevented the Defendant from showing that Linda Maness' in-court testimony differed greatly from her extra-judicial statements regarding the death of the baby. (Tr.245-270)

2. The petitioner was precluded from impeaching Linda Maness by showing that she had written letters to Gary which contained, *inter alia,* statements to the effect that Gary was innocent and that she was sorry for what she had done to him. (Tr.252-260) These letters are attached to the Motion for Leave to Supplement Record Pursuant to Federal Rule of Appellate Procedure 10(c) filed simultaneously herewith.

3. The petitioner was precluded from calling Dana Maness who would have testified that Linda Maness had made extra-judicial statements to her to the effect that the Defendant was innocent of the charges against him. (Tr. 322-325)

4. The petitioner was precluded from calling Ruth Maness who would have testified that Linda Maness' in-court statement significantly differed from her extra-judicial statements. (Tr. 336-337)

ARGUMENT

I

THE OPINION HEREIN SOUGHT TO BE REVIEWED OVERLOOKS AND MISAPPREHENDS CONTROLLING POINTS OF LAW AND FACT CRUCIAL TO A JUST DETERMINATION OF PETITIONER'S CLAIMED CONSTITUTIONAL DEPRIVATIONS.

The majority opinion herein sought to be reviewed states:

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. Opinion at 5251.

The majority opinion thus concedes that the defense of Gary Maness was adversely affected by the state trial court's exclusion of evidence based on the Florida Voucher Rule. The opinion goes on, however, to affirm the denial of habeas corpus relief because in the opinion of the majority the *degree* of the state trial court's interference with the Defendant's efforts to establish a defense were not such that his right to a fair trial was violated. Opinion at 5240. In reaching this decision, it is respectfully submitted that the opinion herein sought to be reviewed overlooks and misconstrues controlling facts and the law of *Chambers v. Mississippi.* In *Chambers* the United States Supreme Court said in no uncertain terms:

> Whatever validity the "voucher" rule may once have

> enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. *Chambers v. Mississippi,* 93 S. Ct. 1038, 1046 (1973)

Here as in *Chambers,* the thrust of the defense is that someone other than the Defendant is guilty of the offense. In *Chambers* the Defendant was permitted to call a Gable McDonald when the state failed to do so in the state's case in chief. When McDonald was on the stand his *written confession* was *admitted* into evidence. On *cross-examination* by the state, McDonald repudiated the confession on the grounds that it was part of a scheme to free Chambers so that a false arrest suit could be brought in which McDonald would participate in the proceeds. After McDonald's repudiation the defense then attempted to cross-examine McDonald *as to his repudiation.* Thus, in *Chambers,* the defense *was permitted* to introduce into evidence the written extra-judicial statement by the witness (something not permitted in the case at bar), but was thwarted only in the cross-examination of the witness as to his repudiation of that extra-judicial statement. In Maness, the letters of Linda Maness were *not* permitted into evidence, notwithstanding the defense's repeated efforts to have the letters admitted. (Tr. 253-260) Thus, the instant opinion's judgment that "*Chambers'* trial was a palpable miscarriage of justice" (Opinion 5250) but that here "the Voucher Rules of application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause" is patently erroneous. The defense was permitted to go much further in *Chambers* than the defense in Maness was permitted to go, and the Supreme Court reversed *Chambers'* conviction because of the application of the Voucher Rule in precluding the cross-examination of McDonald as to his repudiation of the confession. Maness was not even permitted to introduce into evidence the extra-judicial letters of Linda, nor was he permitted to cross-examine her as to the contents of said letters. The written confession of McDonald in *Chambers* is parallel to the letters of Linda Maness in Maness. The confession in McDonald was introduced, the letters in Maness were not. That and that alone is sufficient to establish that the instant case poses a greater deprivation of constitutional rights than that which was present in *Chambers.* The opinion

herein suggests that the deprivation in the Maness case was a lesser degree than that of *Chambers.* That decision can only result from a misapplication of the controlling facts of the *Chambers* decision.

Moreover, the entire thrust of the defense was predicated upon the establishment of a reasonable doubt as to Gary's guilt in light of Linda's letters. The opinion herein sought to be reviewed states:

> Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. Opinion at 5241.

In three or four other parts of the decision herein sought to be reviewed, the majority points out that Linda's letters are not before them and therefore cannot be examined as part of an analysis of whether their preclusion significantly affected Maness' defense. These letters are and have been continuously available to the court. As is set forth with specificity in the Motion to Supplement Record filed simultaneously herewith, sworn allegations as to the contents of the letters were made in the habeas corpus petition. These statements were *not* controverted by the response of the Attorney General of the State of Florida in the District Court. Moreover, the District Court made specific findings as to the contents of the letters. Because these letters are and have been available, it would be improper to deny Gary Maness relief at this juncture predicated upon the unavailability of the letters. This, it is respectfully submitted, the majority opinion herein sought to be reviewed overlooks. As is pointed out in the dissenting opinion of Judge Clark, "at a minimum, it seems to me that this case must be remanded for a determination of the authenticity and content of Linda's letters". To affirm the order dismissing this petition for habeas corpus relief without affording the petitioner an opportunity to present these letters would simply add to the continuing deprivation of this petitioner's constitutional rights.

The opinion herein sought to be reviewed further overlooks and misconstrues the controlling points of fact in the Maness case crucial to a just determination of his claim in that the opinion states:

> Petitioner offered the rather unrealistic explanation

> that the baby may have fallen down, gotten caught in her crib, or hit herself in her head with her bottle. Opinion at 5241.

While it is true that Gary Maness did testify to that effect, the court *overlooked* that later in his testimony he explained that this was his belief *only because* this is what his wife *had told him* as to how the baby had sustained the injuries:

> Q. Now, when you say that you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said, "that's as far as I know," how do you know that's how it happened?
> A. Because Linda told me.
> Q. When did she tell you that?
> A. When I asked her how she [the baby] got the bruises. (Tr.317-318)

Thus, Gary Maness' explanation of how the baby sustained these injuries is entirely consistent with the thrust of his defense, that he was innocent and there was reason to believe his wife did it. The letters corroborate this view. The proffered testimony of Dana Maness corroborates this view.

Moreover, it is respectfully submitted that the opinion herein sought to be reviewed overlooks and misconstrues a controlling point of law in the Maness case in reaching its decision that "this trial record, our inability to find any positive indicia of the reliability of the heresay testimony of Ruth and Dana Maness, and the unavailability of the letters for our inspection, leads us to conclude that the Voucher Rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause." Opinion at 5241. Throughout the instant opinion, the court characterizes the proffered testimony of Dana and Ruth Maness as *"heresay testimony"* which lacks the reliability and trustworthiness common to the heresay testimony in *Chambers*. This is *incorrect*. This testimony (Dana and Ruth) was sought to be introduced to *impeach* Linda Maness' in-court testimony. Thus, it is not heresay at all, but rather a category of non-heresay (not coming in for its truth) and would be acceptable as evidence had it not been excluded based on the Florida Voucher Rule. (See Rule 801.2 of the Federal Rules of Evidence). Thus, the opinion's characterization of Dana and Ruth's testimony as "heresay testimony" lacking the reliability and

trustworthiness of the heresay testimony wrongfully excluded in *Chambers* is a fallacious basis upon which to deny this Defendant habeas corpus relief. Moreover, all of the evidence excluded in the Maness case cross-corroborates each other, thereby supplying the requisite "reliability and trustworthiness" that this instant opinion finds lacking.

It is submitted that the dissenting opinion of Judge Clark in the instant case suggests the constitutionally correct disposition of Gary Maness' present claim:

> The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements, but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumes sole responsibility, subject to the impossible possibility of self injury. Linda's letters and Dana's statements intended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida Voucher Rule which sanctified Linda's testimony from attack by Gary.
>
> As I perceive the due process principle announced in *Chambers*, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. At a minimum, it seems to me that this case must be remanded for determination of the authenticity and content of Linda's letters. If these were her letters and read as described, it further is my view that habeas corpus relief should be granted and Florida should be required to retry Gary in a fair proceeding which admits all of the facts in testing for the truth. Dissenting opinion at 5242.

II

THIS OPINION (A SPLIT DECISION) INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND IT IS THE FIRST ENUNCIATED CASE BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INTERPRETING THE UNITED STATES SUPREME COURT CASE OF CHAMBERS V. MISSISSIPPI, REACHING A RE-

SULT OPPOSITE OF THAT OF THE SUPREME COURT ON ESSENTIALLY THE SAME QUESTIONS OF LAW AND FACT, AND A RESULT INCONSISTENT WITH CASES INVOLVING THE SAME QUESTIONS OF LAW AND FACT FROM OTHER JURISDICTIONS, THEREBY RESULTING IN THE APPROPRIATENESS OF A SUGGESTION FOR REHEARING EN BANC.

Petitioner-Appellant respectfully suggests that a Rehearing En Banc would be appropriate in this cause. The opinion of the court in this cause is sharply divided. The majority opinion does not disagree that the law and facts of Maness are strikingly similar to the law and facts in *Chambers,* where the Supreme Court reversed. The majority, however, attempts to fashion distinctions between Maness and *Chambers* which the dissent fails to perceive.

The instant opinion is the first enunciation by the United States Court of Appeals for the Fifth Circuit interpreting *Chambers v. Mississippi.* Although the facts and points of law are strikingly similar, this court reached a result diametrically opposite to that of the United States Supreme Court in *Chambers.* Moreover, other circuits in interpreting the case of *Chambers v. Mississippi* have reached results contrary to that of the court in the instant case. See *e.g. United States v. Torres,* 477 F. 2d 922 (9th Cir. 1973).

In *United States v. Torres,* supra, the 9th Circuit applied the *Chambers* rationale and reversed a conviction where the trial judge had precluded the defense from inpeaching its own witness. Torres, who was charged with importing and possessing cocaine and heroin, called as a defense witness an Anselmo Lebron, the man who was in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket (in which the drugs were found) had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's testimony by introducing his (Lebron's) prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent surprise, one may not impeach his own witness. The 9th Circuit, citing *Chambers,* reversed the conviction and held:

> It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie.

> It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres . . . The rule against impeaching a parties' own witness [is] a pointless limitation on the search for truth. United States v. Torres, 447 F.2d at 925.

Thus, because the opinion herein sought to be reviewed reaches a result diametrically opposite of that of the Supreme Court in *Chambers* and inconsistent with opinions involving the same question of law and fact in other circuits, the case is one of exceptional importance warranting a suggestion of Rehearing En Banc, especially in light of the well reasoned- dissent of Judge Clark.

CONCLUSION

The tragedy of the fact of the death of this baby of tender years should not cloud or diminish Gary Maness' rights to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution as interpreted by United States Supreme Court in *Chambers v. Mississippi,* 410 U. S. 284, 93 S. Ct. 1038 (1973). The parallels between the Maness case and the *Chambers* case are striking and should not be subject to the technical distinctions involved in calculating the amounts or degrees of prejudice to the Defendant comparatively in the two cases. The opinion herein sought to be reviewed concedes prejudice to the defense by virtue of the application of the Florida Voucher Rule. The Defendant's efforts to establish a reasonable doubt in the minds of the jury as to his guilt were thwarted by application of the Florida Voucher Rule. To grant this Defendant a new trial in which the letters of Linda Maness and the testimony of Dana and Ruth accompanied by the cross-examination by the defense of Linda Maness would further the cause of justice and the preservation of basic constitutional liberties. To deny this new trial on fancied distinctions between this cause and the clear law of the Supreme Court as enunciated in *Chambers* is but another blow to the fundamental constitutional rights of Gary Maness, presently incarcerated within the State of Florida

while his wife, Linda, escapes the damning implications of her extra-judicial letters and comments.

Respectfully submitted,

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GARY MANESS, PETITIONER-APPELLANT,

v.

LOUIE L. WAINWRIGHT, DIRECTOR
DIVISION OF CORRECTIONS,
RESPONDENT-APPELLEE.

No. 74-1538.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1975.

Appeal from the United States District Court for the Southern District of Florida; Peter T. Fay, Judge.

Albert G. Caruana, A.C.L.U. of Fla., Bennett H. Brummer, Asst. Public Defender, Miami, Fla., for petitioner-appellant.

J. Robert Olian, Asst. Gen., William L. Rogers, Asst. Atty. Gen., Miami, Fla., for respondent-appellee.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 25, 1975, 5 Cir., 512 F.2d 88)

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing *en banc* and a majority of the judges in active service having voted in favor of granting a rehearing *en banc*.

It is ordered that the cause shall be reheard by the Court *en banc* on briefs without oral argument. The Clerk shall set a briefing schedule for the filing of supplemental briefs.

GARY MANESS, PETITIONER-APPELLANT,

v.

LOUIE L. WAINWRIGHT, DIRECTOR,
DIVISION OF CORRECTIONS, RESPONDENT-APPELLEE.

No. 74-1538.

United States Court of Appeals,
Fifth Circuit.

March 18, 1976.

Appeal from the United States District Court for the Southern District of Florida, Peter T. Fay, Judge.

(Opinion April 25, 1975, 5 Cir., 512 F.2d 88.)

Albert G. Caruana, Miami, Fla., Bennett H. Brummer, Asst. Public Defender, Miami, Fla., for appellant.

J. Robert Olian, Arthur J. Berger, Asst. Attys. Gen., Miami, Fla., for appellee.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.

BY THE COURT:

It is ordered by the Court that the order heretofore entered on September 2, 1975, 519 F.2d 1085, for a rehearing of this case en banc is hereby vacated, and the within case is remanded to the panel of Judges Morgan, Clark and Gordon, District Judge.

JOHN R. BROWN, Chief Judge.

While I concur in the order vacating the en banc largely because the overwhelming majority thought the case was essentially a factual one, on the merits of the case I register my concurrence in Judge Clark's dissenting opinion for the panel and now that of Judge Goldberg.

GOLDBERG, Circuit Judge, with whom WISDOM,

GODBOLD, CLARK and GEE, Circuit Judges, join, dissenting.

The majority opinion for the panel in this case assumed that the operation of the Florida voucher rule excluded the evidence sought to be introduced, and that the issue before the panel was whether this cumulation of exclusions was consistent with *Chambers v. Mississippi*, 1973, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. I would agree that this case would be unenbancworthy if the panel had avoided the *Chambers* question on any of the several grounds suggested in appellee's briefs, or if the panel majority had presented a version of the facts which contradicted the account succinctly set forward in Judge Clark's dissent. The panel chose, however, to face the *Chambers* issue squarely and, I think, decided it wrongly.

As the majority noted, it was at least a "veiled" theory of the defense that the defendant's wife, and not the defendant, was the perpetrator of the crime. The testimony that the defendant wanted to introduce attacked the wife's story that she was out of the house at a crucial time, attacked the wife's credibility generally, and attempted to demonstrate a basis for the defense theory that the defendant's confession was a lie to protect his wife.

Chambers reaffirmed the general principle that

> [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

410 U.S. at 294, 93 S.Ct. at 1045. I am convinced the panel majority's opinion is inconsistent with this general principle, and can only be distinguished from *Chambers* in immaterial factual details. Assuming the *Chambers* issue had to be faced, I find Judge Clark's dissent from the panel majority unanswerable. I consider this case to be enbancworthy.

GARY MANESS, PETITIONER-APPELLANT,

v.

LOUIE L. WAINWRIGHT, DIRECTOR,
DIVISION OF CORRECTIONS,
RESPONDENT-APPELLEE.

No. 74-1538.

United States Court of Appeals,
Fifth Circuit.

March 18, 1976.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

(Opinion April 25, 1975, 512 F.2d 88)

Before MORGAN and CLARK, Circuit Judges and GORDON, District Judge.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLARK, Circuit Judge:

I dissent from the panel's denial of rehearing for the reasons set forth in my dissent in the panel opinion. I continue to be of the view that the majority has misapplied the principle of *Chambers v. Mississippi* to the facts of this bizarre and tragic case.

SUPREME COURT OF THE UNITED STATES

No. 75-6909

GARY MANESS, PETITIONER,

v.

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA
DEPARTMENT OF OFFENDER REHABILITATION

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 18, 1976

☆ U.S. Government Printing Office: 1976—505-225/757

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-6909

GARY MANESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Offender Rehabilitation,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT L. SHEVIN
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INTRODUCTION

Pursuant to United States Supreme Court Rules 24 and 40(3) and for the purpose of this brief only, the respondent respectfully accepts those portions of petitioners' petition entitled "Opinion Below", "Jurisdiction", "Question Presented", "Constitutional and Statutory Provisions Involved", and "Statement of the Case" as substantially true and correct.

ARGUMENT

THE INSTANT PETITION SHOULD BE DENIED BECAUSE THE RULE OF LAW ANNOUNCED IN MANESS v.WAINWRIGHT, 512 F.2d 88 (5th CIR. 1975) DOES NOT CONFLICT WITH THE RULE OF LAW ANNOUNCED EITHER IN CHAMBERS v. MISSISSIPPI, 410 U.S. 284 (1973) OR UNITED STATES v. TORRES, 477 F.2d 922 (9th CIR. 1973) AND BECAUSE THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW CONCLUSIONS OF A LOWER CIRCUIT COURT THAT DEPEND UPON APPRECIATION OF CIRCUMSTANCES WHICH ADMIT OF DIFFERENT INTERPRETATIONS.

Petitioner asks this Court to review the decision in Manness v. Wainwright, 512 F.2d 88 (5th Cir. 1975); rehearing en banc granted, 519 F.2d 1085 (5th Cir. 1975); rehearing en banc vacated 528 F.2d 1381 (5th Cir. 1976); rehearing denied 528 F.2d 1382 (5th Cir. 1976). There is no assertion by petitioner that this Court should grant its writ of certiorari in the instant case to decide a novel and important question of federal constitutional law which has not heretofore been decided by this Court. It is clear that this Court has already addressed the legal issue involved in Maness when it decided Chambers v. Mississippi, 410 U.S. 284 (1973) and that the lower appellate court merely applied the holding of Chambers to that lower court's interpretation of the facts in Maness to reach its result. Compare National City Bank of New York v. Republic of China, 348 U.S. 356 (1955). Instead, petitioner claims entitlement to a writ on the theory that Maness conflicts with Chambers and United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

It is established that this Court will grant a writ of certiorari where there is a conflict between the rule of law announced in the decision sought to be reviewed and a rule of law announced in the decision with which conflict is alleged. See e.g. United States v. Giordano, 416 U.S. 505 (1974) (conflict with another circuit); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (conflict with other circuits); Hawkins v. United States, 358 U.S. 74 (1958) (conflict with other circuits); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) (conflict with prior Supreme Court decision); Heflin v. United States, 358 U.S. 415 (1959) (conflict with prior Supreme Court decision); Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) (conflict with prior Supreme Court decision and with other circuits); California v. Taylor, 353 U.S. 553 (1957) (conflict between federal circuit court and state supreme court). The rule of law expressed in Maness does not conflict either with the rule of law announced in United States v. Torres, 477 F.2d 922 (9th Cir. 1973) or the rule of law announced in Chambers v. Mississippi, 410 U.S. 284 (1973), in contrast to what petitioner would have this Court believe.

A reading of Torres shows that the holding of Torres was that the evidentiary rule of impeaching one's own witness was, as a matter of federal evidentiary law, nolonger the law in the Ninth Circuit. Chambers was cited in Torres merely as support

for the Ninth Circuit's decision to change its own federal evidentiary law. Torres did not hold that the evidentiary rule in question was impermissible as a matter of federal constitutional law. In Dutton v. Evans, 400 U.S. 74 (1970) this Court stated that a state's evidentiary rule of law does not violate the federal constitution merely because it does not exactly coincide with the same evidentiary rule which is utilized in the federal courts. Moreover, in Murphy v. Florida, 421 U.S. 794 (1975) this Court stated that a decision of this Court expressly rendered in exercise of its supervisory powers is not a constitutional ruling which is binding on the states. Given the distinction between a constitutional decision and an evidentiary decision and also given the recognized right of two sovereigns to maintain diametrically opposed evidentiary rules of law, the non-existance of a real and vital conflict between Torres and Maness becomes obvious. The appearance of conflict loses its reality. Since Maness did not hold Floirda's "voucher" rule unconstitutional but did address whether petitioner was denied due process by application of Florida's evidentiary law to the facts of his case, the rule of law in Maness is not in conflict with the federal evidentiary rule announced in Torres, which latter rule was not based on constitutional grounds.

The rule of law expressed in Chambers likewise does not conflict with the rule of law announced in Maness. In Chambers this Court expressed both what was and what was not its holding.

> In this case, petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi common-law rule that a party may not impeach his own witness. ***
>
> ****
> ****
> ***The "voucher" rule, as applied in this case, plainly interferred with Chambers' right to defend against the State's charges.
>
> We need not decide, however, whether this error alone would occassion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses. ***The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay.
>
> ****
> ****
> ****
>
> ***In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminuation in respect, traditionally accorded to the States in the establment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts of this case the rulings of the trial court deprived Chambers of a fair trial.
>
> Chambers v. Mississippi, supra at 295-303.

This Court expressly stated its holding in Chambers. There is no room for ambiguity. Chambers did not hold all "voucher" rules unconstitutional. Chambers announced no new rule of constitutional law. All that Chambers held was that due process can be denied by a combination of evidentiary rulings which are improper when applied to the facts of a particular case. Chambers'

rule of law is no more than this. Maness reveals that the Fifth Circuit recognized, accepted and adopted the express holding of Chambers. Consequently, as a matter of logic it follows that the rule of law announced in Maness cannot be in conflict with the rule of law announced in Chambers.

The petition sub judice bespeaks the real theory or strategy upon which petitioner relies in his effort to obtain this Court's writ. Petitioner presents a detailed recitation of the facts involved in this case as he construes them. Petitioner stresses factual findings of the lower district court. Petitioner stresses factual findings and conclusions derived therefrom which were made by the lower circuit court and the "dramatic contrast" in the findings of the dissenting opinion. Petitioner points out that in his petition for rehearing, he stressed his disagreement with the factual findings and conclusions derived therefrom that appeared in the Maness opinion. As footnote one(1) of the Maness opinion reveals, letters of Linda Maness, which were proffered at the state trial were not submitted to the lower district court. The instant petition expressly notes that after the Maness opinion was rendered, petitioner filed a motion for leave to supplement the record with many of the alleged letters of Linda Maness -- which motion petitioner admits was denied. Petitioner conspicuously places this motion in the appendix to his petition for this Court to peruse the selected excerpts from these letters in order to buttress his factual assertions. In light of this stressing of facts, petitioner inadvertently tips his hand when he states in his petition "Although the facts and points of law in the two cases are similar, the Fifth Circuit reached a result diametrically opposed to that reached by this Court in Chambers.", (Petition at page 14), and "The opinion further misinterprets controlling facts in the Maness case crucial to a just determination of petitioner's claim.", (Petition at page 16). What then is petitioner's real strategy? It is simply to hope that this Court will view his factual assertions, disagree with the lower court's factual interpretations and grant the requested writ.

In reply to this strategy respondent notes certain principles of law which this Court has in its wisdom established and followed. Where conclusions of a court of appeals depend upon appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. Federal Trade Comm'n v. Standard Oil Co., 355 U.S. 396 (1958); Nat'l Labor Relations Bd. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543 (1927); see Appalachian Power Co. v. American Institute of Certified Public Accountants, __U.S.__, 80 S.Ct. 16 (1959) (decision of Brennan, J. acting as Circuit Justice in denying request for stay of lower court's mandate). The Supreme Court does not grant certiorari to circuit courts of appeal to review evidence and to discuss specific facts. United States v. Johnston, 268 U.S. 220 (1925). In light of this law the concurring opinion of Chief Judge Brown in the en banc decision of the Fifth Circuit to vacate its prior order granting rehearing en banc says much.

> While I concur in the order vacating the en banc largely because the overwhelming majority thought the case was essentially a factual one, on the merits of the case I register my concurrence in Judge Clark's dissenting opinion for the panel and now that of Judge Goldberg.
>
> Maness v. Wainwright, 528 F.2d 1381, 1382 (5th Cir. 1976) (concurring opinion.)

In light of the foregoing arguments, this Court's statement in Layne & Bowler Corp. v. Western Wells Works, Inc., 261 U.S. 387 (1923) is especially pertinent in resolving whether this Court should issue a writ of certiorari to the instant

> It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the ninth, thirteenth, and twetieth claims, that they were really in harmony and not in conflict and that there was no gound for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the comsideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head.
>
> Id. at 392-393.

The instant petition should be denied.

CONCLUSION

For the foregoing reasons the respondent, LOUIE L. WAINWRIGHT, respectfully requests this Honorable Court to deny the instant petition for a writ of certiorari.

Respectfully submitted,

ROBERT L. SHEVIN
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AFFIDAVIT OF SERVICE

I, ARTHUR JOEL BERGER, Assistant Attorney General, State of Florida, first being duly sworn according to law, to depose and say:

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was furnished by mail to each of the following: BENNETT H. BRUMMER, ESQ., Assistant Public Defender, 800 Metro Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125 and ALBERT G. CARUANA, ESQ., American Civil Liberties Union , c/o Greenberg, Traurig, Hoffman, Lipoff and Quentel, P.A., 1401 Brickell Avenue, Miami, Florida 33131; this 16 day of September, 1976.

Arthur Joel Berger

ARTHUR JOEL BERGER
Assistant Attorney General

SWORN TO and SUBSCRIBED before me at Miami, Dade County, Florida, this 16 day of September, 1976.

Notary Public

NOTARY PUBLIC
State of Florida
My Commission Expires: September 16, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6909

GARY MANESS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 512 F.2d 88. (A. 226)

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on April 15, 1975. A suggestion for rehearing en banc was timely filed, (A. 232) and was granted on September 2, 1975. (A. 243) On March 18, 1976, the court of appeals, sitting en banc, voted 10:5 to vacate its order granting rehearing en banc. 512 F.2d 1381 (A. 244)

A petition for writ of certiorari was timely filed within ninety days of the disposition of the suggestion for rehearing en banc, invoking this Court's jurisdiction under 28 U.S.C. §1254(1). Certiorari was granted on October 18, 1976.

QUESTION PRESENTED

WHETHER THE COURT BELOW ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF A PARTY'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND VIOLATING THE PETITIONER'S RIGHTS TO A FAIR TRIAL, COMPULSORY PROCESS, CONFRONTATION, AND CROSS-EXAMINATION, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

Section 1 of Amendment XIV to the Constitution of the United States provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT

A. The Prosecution of the Petitioner in State Court

This case arises from the petitioner's trial on charges that he was criminally responsible for the death of his and his wife, Linda's, infant daughter. The infant, Misty Maness, died in April of 1971, the victim of the "battered child syndrome." The police conducted an investigation of both petitioner and his wife regarding the death of the child.

On June 8, 1971, an information was filed in the Criminal Court of Record, Dade County, Florida, charging the petitioner with manslaughter. Petitioner entered a plea of not guilty, and a jury trial was had on October 4th and 5th, 1971.

During the trial, the petitioner sought to establish that he was innocent of the charge and that there was

reason to believe that his wife, Linda Maness, the only other suspect, had committed the offense.[1]

The petitioner testified at the hearing on his motion to suppress that he had made an inculpatory extra-judicial statement to the police to protect his wife, because she had told him that she was pregnant. Petitioner further testified that the statement he had previously given was one which he had agreed upon with his wife prior to their interrogation by the police in order to protect her from arrest and was not, in fact, the true version of what had happened. (A. 14-15, 108-109, 117)

The state did not charge Linda with responsibility for the infant's death. The state had listed Linda on its witness list, (A. 21-22) and subpoenaed her from Texas to appear at the petitioner's trial. (A. 17) The prosecution did not, however, call Linda as a witness in its case in chief. Petitioner's trial counsel was thus forced to call Linda as a witness, and immediately asked the court to declare the witness an adverse and hostile witness so that she could be cross-examined. (A. 85) The court repeatedly refused to permit the defense to treat Linda as an adverse and hostile witness. Linda testified consistently with the state's position. Defense counsel's attempts to impeach her testimony, in which she, *inter alia*, denied striking the baby, were prohibited by the state trial court on the grounds that the

[1] Petitioner's trial counsel made a five sentence opening statement to the jury, in which he said that the petitioner had made a statement to the police, but that he would show that the statement was untrue. He also stated: "[W]e will show who, in fact, probably did kill the child." (A. 25) Immediately prior to the commencement of the trial, defense counsel had characterized Linda Maness as the "defendant's chief witness." (A. 17)

petitioner would not be permitted to impeach his own witness.[2] (A. 85-97; 100)

LINDA MANESS was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q BY MR. MINKUS: Did you ever tell –
THE COURT: May we have her name and address –
MR. McWILLIAMS: Objection.
THE COURT: – on the record?
Q (By Mr. Minkus) What is your name and address, for the record?
A Mrs. Gary Maness, 225 Harvard Avenue, El Paso, Texas.
MR. MINKUS: At the particular time, Judge, I would like to question the witness as an adversary and hostile witness.
THE COURT: Denied. There's no showing.
Q (By Mr. Minkus) Did you ever have a conversation –
MR. McWILLIAMS: Objection.
THE COURT: Sustained.
Q (By Mr. Minkus) Did you ever tell Mrs. McClain –
MR. McWILLIAMS: Objection
THE COURT: Too leading?
MR. McWILLIAMS: No, Judge. He's trying to impeach a witness he hasn't asked any questions on direct yet. It's an improper predicate.
THE COURT: Well, objection sustained to leading.
I don't know. He has not asked the rest of the question. I don't know whether he's impeaching or not.

[2] The "voucher rule" applied by the Florida court is identical to the rule condemned in *Chambers v. Mississippi*, see n. 5, *infra*.

Q (by Mr. Minkus) *Did you kill your baby*?
A No, I did not.
Q *Did you every strike your baby* –
A No, I didn't
Q – In the face?
A No.
Q And in the head?
A No.
Q *Isn't it a fact that you know that your husband Gary Maness* –
MR. McWILLIAMS: Objection.
Q (By Mr. Minkus) – *did not* –
MR. McWILLIAMS: Objection, Judge.
THE COURT: Sustained.
MR. McWILLIAMS: Counsel, it's your witness.
MR. MINKUS: Yes, she is an adverse, hostile witness.
MR. McWILLIAMS: Objection to those statements. I move they be stricken. Ask the jury to disregard it.
THE COURT: Objection sustained. Stricken.
(A. 85-86) (emphasis added)

Moreover, the defense was precluded from introducing inculpatory and impeaching letters written by Linda Maness to Gary while he was in jail awaiting trial. (A. 88-92) These letters in effect tended to exculpate Gary Maness in that they stated, *inter alia*, that Gary had not done the act with which he was charged. (A. 89).

Later in the petitioner's trial, the defense counsel called Dana Maness, petitioner's sister-in-law, as a witness. The state objected to her testifying on the grounds that her testimony would tend to impeach Linda, whom the state argued was a defense witness and therefore could not be impeached by the defense pursuant to the voucher rule. This objection was sustained by the trial court. (A. 123-124) Defense counsel then proffered to the court that Dana Maness would testify that, while in Tennessee, Linda had had a

conversation with her in which she told Dana that Gary Maness did not touch the baby and that she did not know what happened, but that Gary Maness did not do what he had been charged with. (A. 123) The proffer of Dana's testimony also included an admission by Linda that she had never left her home on the afternoon the baby was fatally injured. (A. 123) This would have contradicted Linda's in-court testimony (A. 87) and statements to the police, supported petitioner's defense, and corroborated his testimony repudiating his confession. The state trial court ruled that the witness would be precluded from testifying in the manner proffered since this would violate the rule of evidence which prevents a party from impeaching his own witness. (A. 124)

Defense counsel also attempted to call Ruth Maness, the mother of the defendant, but the state objected to her proffered testimony on the grounds that it tended to impeach Linda, a defense witness, and therefore was improper under Florida's voucher rule. The trial court sustained the prosecution's objection. (A. 124) The proffer concerned certain bloody blankets which were found at the Maness residence while Misty was in the hospital. Linda had testified before the jury that the source of this blood was the baby's cracked gum. (A. 95) The proffer of Ruth's testimony was that Linda had told her that the bloody baby blanket was a result of Linda's menstrual period. (A. 124) This testimony, reflecting a prior inconsistent statement by Linda, was excluded by application of the voucher rule. (A. 124)

The petitioner took the stand to testify in his own defense. His testimony directly contradicted Linda's on a number of crucial points.

The petitioner testified that Linda was lying when she stated that she had left the house on the afternoon

the injuries were inflicted. (A. 117)[3] The petitioner admitted that he had lied when he had stated to the police that this was the case, but testified that he had done so for the purpose of protecting his wife. (A. 108-109, 114, 117, 120) He had been protecting his wife because she had told him that she was pregnant, and the police had told him that if he did not confess there was a good chance that his wife would go to jail. (A. 108-109, 114, 117, 120)

On cross-examination by the state, Linda had testified that she had seen the petitioner slap the baby in the face on the day in question. (A. 97) The petitioner testified that his wife was lying and that he did not at any time strike the baby in the face. (A. 100, 113, 115)

Linda described an incident in which the petitioner had slapped the baby on the leg, and when Linda had tried to pick up the baby, the petitioner had slapped Linda. (A. 97-98) The petitioner testified that his wife was lying and that it was his wife who had slapped the baby on that occasion. He told her to stop, she said she did not have to, that it was her baby, and the petitioner then slapped his wife. (A. 104-105)

Linda testified that the petitioner had told her that he was not ready to be married and that she should take the baby and go back to her parents. (A. 94, 98) The petitioner testified that he did not feel unduly burdened by the marriage, and that he had not told his wife to leave. (A. 110-111, 115-116) The petitioner testified that it was his wife who had been unhappy and wanted a divorce. (A. 116, 110)

---

[3] Based on the voucher rule, the defense had been precluded from establishing that Linda, in her first statement to the police, did not claim that she was out of the house on the afternoon in question. (A. 90-92)

Defense counsel attempted to inquire whether Linda had filed for a divorce against the petitioner. The trial judge sustained the state's objection on relevancy grounds. (A. 93)

With regard to how the baby had sustained its injuries, the petitioner testified that he knew only what his wife had told him in this regard. According to what Linda had told him, and to the best of his knowledge, the baby had fallen down, or gotten caught in its crib, or hit itself in the head with its bottle. (A. 120, 118-119, 115, 103-105)

The defense's case, as limited by the trial court's repeated exclusions of evidence based on the state voucher rule, went to the jury and, on October 5th, 1971, the jury returned a verdict of guilty. The court adjudged the petitioner guilty and sentenced him to be confined in the state penitentiary for a period of twenty years.

B. The Direct Appeal

Petitioner timely appealed from the judgment of conviction and sentence to the District Court of Appeal of Florida, Third District. The judgment of the trial court was affirmed. *Maness v. State*, 262 So.2d 716 (Fla. 3rd D.C.A. 1972). (A. 186).

In that appeal, the petitioner claimed that the trial court had deprived him of the right to offer testimony and present a defense as guaranteed by the due process clause of the Fourteenth Amendment, relying *inter alia* on *Washington v. Texas*, 388 U.S. 14 (1967). The District Court of Appeal rejected this argument and reaffirmed the voucher rule by holding: "An attempt by the defendant to impeach his own witness was properly denied by the court, on objection by the State." *Maness v. State*, 262 So.2d at 717. (A. 187)

C. The Petition for Federal Habeas Corpus Relief

On October 23, 1973, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Florida. (A. 188, 194) The petitioner claimed that the exclusion of defense evidence by the state trial judge denied the petitioner due process of law and contravened principles enunciated by the Supreme Court of the United States in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

More specifically, the petition for habeas corpus relief alleged a deprivation of the petitioner's fundamental constitutional rights to due process of law because:

> 1. The petitioner was precluded from cross-examination of Linda Maness, the only other suspect to the crime, regarding her knowledge that Gary Maness was innocent, and prevented the Defendant from showing that Linda Maness' in-court testimony differed greatly from her extra-judicial statements regarding the death of the baby.
>
> 2. The petitioner was precluded from impeaching Linda Maness by showing that she had written letters to Gary which contained, *inter alia*, statements to the effect that Gary was innocent and that she was sorry for what she had done to him.
>
> 3. The petitioner was precluded from calling Dana Maness who would have testified that Linda Maness had made extra-judicial statements to her to the effect that the Defendant was innocent of the charges against him.
>
> 4. The petitioner was precluded from calling Ruth Maness who would have testified that Linda Maness' in-court statement was inconsistent with a prior extra-judicial statement.

The habeas corpus petition averred that:

> Defense counsel had asked the Court for permission to treat Linda Maness as an adverse witness so that it could impeach her statement regarding the commission of the offense with which the defendant was charged. Defense counsel was trying to show that Linda Maness and *not* the petitioner had battered the child and caused the child's death. He was precluded from doing so by the trial court's ruling regarding the impeachment of one's own witness. (A. 198)

The district judge made no finding of fact regarding the role of the petitioner's wife in the trial or the nature of her testimony, except that the defense had moved to call her as an adverse or hostile witness and that this motion had been denied. (A. 213) The petition alleged that upon taking the stand, "Linda Maness testified consistently with the State's position. . . ." (A. 195) The respondent confirmed this allegation:

> It was Linda Maness' testimony that on the day in question the victim was in good health throughout the day until Mrs. Maness left about 4:00 or 4:15 p.m. When she returned she found the child in the battered condition in which she died . . . She further stated she did not know how the child was injured. (A. 205)

On December 18, 1973, the district court entered its order of dismissal of the habeas corpus petition. (A. 212) The district court found that the petitioner had adequately exhausted his state remedies, and so decided the case on the merits. (A. 215) It also determined that *Chambers v. Mississippi, surpa*, had announced no new principles of constitutional law, and that Florida's assertion that petitioner's claim presented a question regarding the retroactive application of *Chambers* was incorrect. (A. 219)

The district judge held that the evidentiary rulings of the state court "did not have the effect of thwarting any defense theory the petitioner sought to assert." (A. 218) This conclusion was reached notwithstanding the district judge's findings of fact:

> Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; *that she knew petitioner had not done it*; that she felt guilty about what she was doing to petitioner; and *that she was not at the store during the afternoon of April 14, 1971.* These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness.
>
> Finally petitioner attempted to present the testimony of his sister-in-law, Dana Maness, regarding admissions made to her by petitioner's wife that *petitioner had not touched the baby*; and that she did not know what had really happened; *and that she had never left her home during the afternoon hours of April 14, 1971.* (A. 213-14) (Emphasis added.)

D. The Appeal From the Denial of Federal Habeas Corpus Relief

On January 9, 1974, petitioner filed a motion for reconsideration or alternatively for a certificate of probable cause and memorandum in support thereof. (A. 219) On January 14, 1974, the district judge entered his order denying the motion for reconsideration and granting a certificate of probable cause to appeal and leave to proceed in forma pauperis.

On January 18, 1974, the petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On appeal, the petitioner argued:

THE DISTRICT COURT ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF ONE'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND DENYING THE PETITIONER DUE PROCESS OF LAW.

The factual parallels between the instant case and *Chambers v. Mississippi*, 410 U.S. 284 (1973), were extensively argued both in petitioner's brief and in oral argument. Petitioner also relied on the ruling of the Ninth Circuit in *United States v. Torres*, 477 F.2d 924 (9th Cir. 1973). *Torres*, relying upon the rule announced by this Court in *Chambers*, reversed a conviction and held that:

> [T]he rule against impeaching a party's own witness [is] a pointless limitation on the search for truth. *Id.* at 925.

The Fifth Circuit, in a split decision, rejected petitioner's arguments, notwithstanding the majority's unequivocal findings that:

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. *Maness v. Wainwright*, 512 F.2d 88, 92 (5th Cir. 1975)
>
> It would certainly have furthered the 'integrity of the fact-finding process' *Chambers, supra* at 925, 93 S.Ct. at 1046, if Maness had been allowed to cross-examine her [Linda]. 512 F.2d at 91.

The majority, in essence, based its affirmance on the following:

a. *Chambers* is applicable, but "we cannot read *Chambers* as broadly as Maness would have us. . . ." 512 F.2d at 91.

b. Although Maness' defense was restricted by operation of the state voucher rule, the applications of the rule did not amount to the degree of interference which would constitute a denial of Maness' right to a fundamentally fair trial. 512 F.2d at 89, 92.

c. Maness' explanation as to how the baby was injured was unrealistic. The opinion finds:

> "Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in the head with her bottle." 512 F.2d at 92.

d. With regard to the proffered but excluded testimony of Dana and Ruth Maness (which contradicted Linda's in-court testimony and statements to the police), the court did "not find in a close relative's testimony the 'persuasive assurances of trustworthiness' cited by the Court in *Chambers*. . . ." 512 F.2d at 92.

e. Linda's letters which were excluded by the state trial judge, were not made part of the record and "it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense." 512 F.2d at 91.

In dramatic contrast to the findings in the majority opinion, Judge Clark, dissenting, could perceive no distinction between the proof wrongfully excluded in *Chambers* and that refused in the case at bar. 512 F.2d at 93.

Judge Clark found that the excluded evidence corroborated Maness' repudiation of his confession, that the evidence was excluded as a direct result of the application of Florida's voucher rule, that the exclusion of this evidence violated due process of law, and that, at a minimum, the case should have been remanded for a determination of the authenticity and content of Linda's letters.

On or about May 21, 1975, petitioner filed his petition for rehearing and suggestion for rehearing en banc. (A. 232)

The bases for the petition were arguments that:

1) The majority's narrow interpretation of the holding of *Chambers* was erroneous, especially in light of its finding that *Chambers* was applicable to the case.

2) Even accepting a narrow interpretation of the *Chambers* holding, the state trial judge's repeated exclusions of evidence based on Florida voucher rule interfered with Maness' ability to present his defense to such a degree that his constitutional right to due process of law was violated.

3) The majority's finding that Maness' in-court explanation of how the baby sustained its injuries was improbable, overlooked Maness' testimony that he based this explanation on what "Linda told me . . . [w]hen I asked her how she [the baby] got the bruises." (A. 120. *See also* A. 103, 105, 115, 118-119). In context, this version of the baby's injury is entirely consistent with the petitioner's version of the events of the day in question and with the thrust of his defense.

4) The majority's repeated references to the fact that Linda's letters were not part of the record on appeal, and, that they therefore could not be evaluated by the court to determine what effect their exclusion would have had on the defense, were irrelevant and improper. The habeas petition contained sworn allegations as to

the letters' contents. The State of Florida did not controvert these averments. The habeas judge, in his order of dismissal of December 18, 1973 (A. 212), made findings as to the nature and contents of Linda's letters, which findings were not attacked by the respondent at any time. Moreover, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Federal Appellate Rule 10(c), which motion contained synopses of the contents of the letters, and to which copies of Linda's most damning letters had been attached.[4]

5) The majority's finding that the excluded testimony of Dana and Ruth Maness lacked the "reliability and trustworthiness" which characterized the "hearsay" improperly excluded in *Chambers* was erroneous and irrelevant. The proffered testimony was intended to impeach Linda's in-court testimony and therefore was not "hearsay" as the majority erroneously concluded. Rather, the impeachment evidence was non-hearsay, in that it was not coming in for its truth. Also, and alternatively, the fact that this evidence cross-corroborates the other excluded evidence and Maness' testimony, rendered its exclusion even more prejudicial.

Petitioner argued that the case involved a matter of exceptional importance, warranting a rehearing en banc. In that regard, the petitioner argued that the *Maness* case was the first enunciation of the Fifth Circuit directly interpreting *Chambers* and that the majority had erred in reaching a result opposite that reached by this Court in *Chambers*. Petitioner also argued that the *Maness* decision was irreconcilable not only with *Chambers*, but with the Ninth Circuit's recent case applying *Chambers*, *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973).

[4] The motion was denied without opinion on June 11, 1975.

As previously mentioned, simultaneously with the filing of the petition for rehearing, petitioner filed a motion for leave to supplement record pursuant to Federal Appellate Rule 10(c). Attached to the motion were copies of many of Linda's letters which had been excluded by the state trial judge. The motion pointed out that the majority's numerous references to the unavailability of the letters had been the first time the apparent lack of the letters had been relied upon to deny Maness habeas corpus relief. Moreover, the motion set forth petitioner's repeated efforts to admit the letters at his trial. (See A. 88-92) This motion was denied without opinion by the Fifth Circuit on June 11, 1975.

In response to the petition for rehearing and suggestion of the appropriateness of a rehearing en banc, a majority of the judges of the Fifth Circuit voted in favor of granting a rehearing of the cause en banc on briefs without oral argument. 519 F.2d 1085. (A. 243) In accordance with the order, the parties filed supplemental briefs.

On March 18, 1976, the court entered two orders. The first denied the petition for rehearing. (A. 246) The second vacated the September 2, 1975, order granting rehearing en banc. (A. 244) From the order denying rehearing, Judge Clark dissented: "[T]he majority has misapplied the principles of *Chambers v. Mississippi* to the facts of this bizarre and tragic case." (A. 246) 528 F.2d 1383.

The order denying rehearing en banc was signed by nine circuit judges, five dissented, and one concurred in part.

The five dissenters and Chief Judge Brown, concurring with the dissent, opined that the en banc majority had decided the *Maness* case on the basis of *Chambers*, but had reached the wrong result. The en

banc dissenters observed that the majority failed to present a version of the facts which contradicted the account set forth in Judge Clark's dissent, which dissent was characterized as "unanswerable." 512 F.2d at 1382. The en banc dissenters acknowledged that Maness' defense theory was that there was reason to believe that Linda, rather than the petitioner, was the perpetrator of the crime, and that all evidence excluded tended to corroborate this defense. The dissenters concluded that *Chambers* requires that a defendant be afforded a fair opportunity to defend, that the majority opinion is clearly inconsistent with *Chambers*, and that *Chambers* can only be distinguished "in immaterial factual details." 512 F.2d at 1382.

ARGUMENT

I.

THE COURT BELOW ERRED IN DENYING HABEAS CORPUS RELIEF WHERE THE STATE TRIAL JUDGE APPLIED A STATE EVIDENTIARY RULE REGARDING THE IMPEACHMENT OF A PARTY'S OWN WITNESS TO PRECLUDE THE PETITIONER FROM PRESENTING EVIDENCE WHICH WOULD HAVE TENDED TO ESTABLISH HIS DEFENSE, CONTROVERT THE ALIBI TESTIMONY OF THE ONLY OTHER SUSPECT, AND IMPEACH THE OTHER SUSPECT'S CREDIBILITY, THUS RENDERING THE PETITIONER'S DEFENSE FAR LESS PERSUASIVE AND VIOLATING THE PETITIONER'S RIGHTS TO A FAIR TRIAL, COMPULSORY PROCESS, CONFRONTATION, AND CROSS-EXAMINATION, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTHTEENTH AMENDMENT.

In the instant case, as in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the issue presented is whether the application of a state "voucher" rule which resulted in the exclusion of testimony and evidence exculpatory of the defendant amounted to a deprivation of the defendant's right to due process of law.

The majority opinion as to which review is sought states:

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The majority opinion thus concedes that Gary Maness' defense was adversely affected by the state trial court's exclusion of evidence based on the Florida voucher rule. The opinion goes on, however, to affirm the denial of habeas corpus relief because, in the opinion of the majority, the *degree* of the state trial court's interference with the petitioner's efforts to establish a defense did not violate Maness' right to a fair trial. 512 F.2d at 91-92. In reaching this decision, it is submitted the opinion *sub judice* misinterprets and misapplies the controlling facts and law of *Chambers v. Mississippi.*

In *Chambers*, this Court reversed a state murder conviction. The reversal was based in part on the principle that a state's voucher rule, could not, consistent with due process, be applied so as to interfere with a criminal defendant's fair opportunity to present a defense. In *Chambers*, this Court concluded:

> Whatever validity the "voucher" rule may once have enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little relationship to the realities of the criminal process. 410 U.S. at 296.

A. The Majority Opinion *Sub Judice* Overlooks And Misconstrues Controlling Law And Fact In Reaching The Conclusion That *Chambers* Is Materially Distinguishable From The Instant Case And That The Application Of The Voucher Rule Did Not Deprive The Petitioner Of A Fundamentally Fair Trial.

1. The factual parallels between *Chambers* and *Maness* are striking.

Chambers was charged with killing a police officer. One Gable McDonald had been present at the scene of the crime. McDonald made a number of extrajudicial admissions that he had committed the crime, but repudiated them at Chambers' preliminary hearing.

At his trial, Chambers attempted to develop two grounds of defense: 1) that he did not commit the crime, and 2) that Gable McDonald did. Chambers was partially successful in bringing evidence in support of this defense before the jury, but his efforts were thwarted by the strict application of certain state evidentiary rules.

Chambers requested that he be allowed to call McDonald as an adverse witness if the State failed to call McDonald to the stand. The trial court permitted Chambers to call McDonald, but not as an adverse witness. McDonald's written confession was admitted into evidence. The State, on cross-examination, elicited from McDonald that he had repudiated his prior admissions. The defense then sought to cross-examine McDonald *as to the repudiation.* The trial court applied Mississippi's voucher rule to preclude this cross-examination. The scope of Chambers' direct examination of McDonald was also restricted by the voucher rule's corollary that the party calling a witness is bound by anything the witness might say.

Thwarted in his attempt to directly challenge McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of witnesses to whom McDonald had admitted his complicity. The State objected on hearsay grounds, and the trial court sustained the objection.

This Court analyzed Chamber's predicament:

> As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. 410 U.S. at 294.

After noting that Chambers had been relegated to chipping away at the fringes of McDonald's story, the Court observed:

> Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted. 410 U.S. at 294.

The parallels between *Chambers* and the instant case are striking. The Mississippi common law voucher rule, which was declared unconstitutional as applied in *Chambers* is identical to the Florida voucher rule which was applied against the petitioner.[5] Other significant

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[5] Florida's "voucher rule" is embodied in *Fla. Stat.* §90.09. In *Johnson v. State*, 178 So.2d 724, 728 (Fla. 2nd D.C.A. 1965), the court held that *Fla. Stat.* §90.09 was "little more than declaratory of the rule as it existed before. . . . [T]he statute was identical with the majority *American common law* rule [regarding the impeachment of a party's own witness]."

In *Chambers*, the Mississippi common law voucher rule was said to rest on the presumption—with regard to the circumstances of the particular case—that a party who calls a witness vouches for his credibility. This Court traced the origins of the voucher

(continued)

parallels are the role of Linda Maness to that of Gable McDonald, and the inability of the defendant in each case to bring the relevant facts before the jury due to the application of state evidentiary rules.

Linda Maness had been present at the scene of the offense at or about the time of the crime. (A. 97, 101, 213) She was the only other possible suspect, and Maness' trial counsel, in his opening statement to the jury, simply stated that Gary had not committed the crime, and that the defense would show who did. (A. 25, *see* n. 1 *supra* and accompanying text.) Linda had made a number of extra-judicial statements which were against her penal interest with regard to the offense, and which exculpated the petitioner. (A. 88-92, 123-124)

Linda Maness was not called as a witness by the state. At the close of the state's case, the petitioner called her to the stand.

Defense counsel repeatedly requested that he be allowed to treat Linda Maness as an adverse witness. The court repeatedly denied these requests. (A. 85, 86, 90, 91, 92)

(footnote continued from preceding page)

rule to a "primitive English trial practice in which 'oath-takers' or 'compurgators' were called to stand behind a particular party's position in any controversy." 410 U.S. at 296. The Florida court of appeals in *Johnson v. State, supra*, at 727, traced the origins of *Fla. Stat.* §90.09 to the same source:

> The rule that one may not impeach his own witness has its most likely origin in trial by compurgation, or wager of law, in which the defendant or person accused was to make oath of his own innocence and to produce a certain number of compurgators, to swear that they believed his oath. III Blackstone 342. It is logical enough to say that the party avouches for or guarantees the credibility of his 'oath helpers'.

The defense then asked Linda whether she had killed her baby or ever struck it. She answered in the negative. (A. 85).

Defense counsel attempted to cross-examine Linda Maness. He was interrupted in the middle of his question: "Isn't it a fact that you know that your husband, Gary Maness did not –", by the state's objection based on Florida's voucher rule. The trial court sustained the objection. (A. 85-86)

Thwarted in his attempt to directly challenge Linda Maness' testimony from the witness stand, the petitioner made an effort to impeach her indirectly. This effort was accurately described by the federal habeas judge:

> Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by the petitioner to impeach or discredit his own witness. (A. 213-214)

Thus the state trial judge repeatedly applied Florida's voucher rule to exclude evidence which the petitioner was attempting to bring before the jury. The petitioner was placed in a worse predicament than that in which Chambers had been. The petitioner was precluded from chipping away at Linda Maness' testimony; he was absolutely unable to cross-examine her or present other witnesses who would have discredited her testimony. The state trial judge abridged the petitioner's federally protected rights and rendered his defense "far less persuasive" than it otherwise would have been. *Chambers*, 410 U.S. at 294.

Thus, as in *Chambers*, the thrust of the petitioner's defense is that someone other than the petitioner is guilty of the offense. In *Chambers*, the defendant was permitted to call one Gable McDonald when the State failed to do so in the State's case in chief. When McDonald was on the stand his *written confession* was *admitted* into evidence. On cross-examination by the State, McDonald repudiated the confession on the grounds that it was part of a scheme to free Chambers so that a false arrest suit could be brought and McDonald could participate in the proceeds. After McDonald's repudiation, the defense attempted to cross-examine him *as to his repudiation.* Thus, in *Chambers*, the defense was permitted to introduce into evidence the written extra-judicial statement by the witness (something not permitted in the case at bar), and was thwarted only in the cross-examination of the witness as to his repudiation of that extra-judicial statement.

In contrast, in *Maness*, Linda's letters were *not* permitted into evidence, notwithstanding the defense's repeated efforts to have the letters admitted. (A. 88-92) Thus, the instant opinion's judgment that "*Chambers*' trial was a palpable miscarriage of justice," (512 F.2d at 91) but that here "the Voucher Rule's application did not deprive Maness of a trial in accord with notions of fundamental fairness embodied in the due process clause" (512 F.2d at 92) is patently erroneous.

The defense was permitted to go much further in *Chambers* than the defense in *Maness* was permitted to go, yet this Court reversed Chambers' conviction because of the application of the voucher rule in precluding the cross-examination of McDonald as to his repudiation of the confession. Petitioner was not even permitted to introduce into evidence Linda's letters, nor was he permitted to cross-examine her as to the

contents of those letters. The written confession of McDonald in *Chambers*, is parallel to Linda's letters in *Maness.*[6] The confession in *Chambers* was introduced into evidence; the letters in *Maness* were not. That and that alone is sufficient to establish that the instant case manifests a greater deprivation of constitutional rights than that which was present in *Chambers.* The opinion *sub judice* suggests that the deprivation in the *Maness* case was of a lesser degree than that in *Chambers.* This conclusion could only have resulted from a misapplication of the controlling facts of the *Chambers* decision.

2. In attempting to fashion distinctions between *Chambers* and *Maness*, the majority opinion misconstrues and overlooks controlling facts and law.

In attempting to fashion distinctions between *Chambers* and *Maness*, the majority opinion of the Fifth Circuit misconstrues and overlooks controlling facts and law. Such errors occur in at least three significant areas: the mischaracterization of Dana and Ruth Maness' proffered testimony as "hearsay" lacking the necessary indicia of trustworthiness; the findings concerning Gary's version of the baby's death; and the effect of Linda's letters not having been included in the record on appeal.

As to the first point, throughout the instant opinion, the majority characterizes the proffered testimony of Dana and Ruth Maness as "hearsay testimony" which lacks the reliability and trustworthiness common to the hearsay testimony improperly excluded in *Chambers.*

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[6] These letters tend to exculpate petitioner and support his defense. To the extent they exculpate Gary, they inculpate Linda, as it is undisputed that she is the only other suspect.

This characterization is inaccurate. This testimony was sought to be introduced for the purpose of impeaching Linda Maness' in-court testimony. Thus, it is not hearsay at all, but rather non-hearsay, in that it was not coming in for its truth, and would have been acceptable as impeachment evidence had it not been excluded on the basis of the Florida voucher rule. *Tomlinson v. Peninsular Naval Stores Co.*, 61 Fla. 453, 55 So. 548 (1911); *Wallace v. Rashkow*, 270 So.2d 743 (Fla. 3rd D.C.A. 1972); *cf.* Rule 801(d)(1), *Federal Rules of Evidence.* Significantly, the record before the Fifth Circuit clearly reflected that the state trial judge had excluded Dana and Ruth's proffered testimony, not on hearsay grounds, but on the basis of Florida's voucher rule.[7] Thus, the majority opinion's characterization of

[7] MR. MINKUS: She is going to state that there was a conversation in an automobile in Tennessee where they were burying the baby and there was also another girl present, the sister of the defendant, who was not able to be here because she is having a baby, where she said—where Linda Maness said—that Gary did not touch the baby; that she did not know what happened and that she never left her home to go to the store and leave the baby alone during the date of April 14, 1971.

McWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained.

MR. MINKUS: Well then, there was another conversation on April 23, wherein Linda Maness made the statement to the effect that Gary didn't do it.

MR. McWILLIAMS: Same objection.

THE COURT: Sustained.

* * *

MR. MINKUS: Mrs. Ruth Maness, the mother of the defendant. She came to the home of the accused during the week of April 14 to the 22nd, or until the 18th, while the baby was lying in the hospital; that there were found some bloody baby blankets, and that Linda Maness was asked, "How did this blood get on these?" And she said that they got on the blanket because she had her period.

MR. McWILLIAMS: He is trying to impeach his own witness, Judge.

THE COURT: Sustained. It will be sustained. (A. 123-124)

Dana and Ruth's testimony as "hearsay" is fallacious.[8]

The majority's finding as to the defense's version of the manner in which the baby sustained its injuries is also fallacious. The majority improperly attributes the following implausible explanation to the petitioner:

> Petitioner offered the rather unrealistic explanation that the baby may have fallen down, gotten caught in her crib, or hit herself in her head with her bottle. 512 F.2d at 92.

While it is true that Gary Maness did testify to that effect, the record before the Fifth Circuit clearly reflected that the source of that explanation was the petitioner's wife. The court, however, ignored the fact that the petitioner later testified that this was his belief *only because this is what his wife had told him*:

> Q. Now, when you say that you told the doctors that the baby hurt itself by hitting itself against the crib, and with the baby bottle, and you said "that's as far as I know," how do you know that's how it happened?
>
> A. Because Linda told me.
>
> Q. When did she tell you that?
>
> A. When I asked her how she [the baby] got the bruises. (A. 120; see also A. 118-119, 115, 103, 105)

[8] Even assuming *arguendo* that the excluded evidence could properly be characterized as hearsay, the evidence was sufficiently reliable and trustworthy to warrant its presentation to the jury. Each of the items excluded corroborates the others, as well as the petitioner's in-court testimony in support of his defense. Equally important, Linda, Dana, and Ruth were all present in court and subject to full examination by both parties concerning the statements in question. *See Chambers, supra* at 301. Thus, the evidence should have been admitted, and its credibility left for the jury to weigh.

Thus, Gary Maness' explanation of how the baby sustained these injuries is entirely consistent with the thrust of his defense, that he was innocent and there was reason to believe his wife lied. Linda's letters, which the defense attempted to introduce into evidence, corroborate this defense position. The proffered testimony of Dana Maness also corroborates this view, as does that of Ruth Maness.

The petitioner's defense was also predicated upon the establishment of a reasonable doubt as to Gary's guilt in light of Linda's letters. The majority opinion states:

> Unfortunately, these letters are not part of the record on appeal and it is therefore impossible to evaluate with any assurance the possible impact they may have had on Maness' defense. 512 F.2d at 91.

The majority repeatedly pointed out that Linda's letters were not before them and therefore could not be examined as part of whether their preclusion significantly affected Maness' defense. 512 F.2d at 89, 91, 92. However, sworn allegations as to the content of the letters were made in the habeas corpus petition. These statements were *not* controverted by the response of the Attorney General of the State of Florida in the district court. Moreover, the district court made specific findings as to the content of the letters. (A. 213-214) Because the habeas judge made findings as to the nature and content of Linda's letters, which findings were supported by the record, it was highly improper for the Fifth Circuit to deny petitioner relief predicated upon the perceived unavailability of the letters. *See Walker v. Johnston*, 312 U.S. 275, 284 (1941).

It is submitted that the dissenting opinion of Judge Clark in the instant case suggests the constitutionally correct disposition of petitioner's claim:

> The missing letters from wife Linda, according to our only information as to their content, not only supported Dana's statements, but also substantiated the theory of Gary's defense. Misty received fatal wounds while she was in the custody of Gary or Linda, or both of them. Gary's confession assumes sole responsibility, subject to the impossible possibility of self injury. Linda's letters and Dana's statements tended to cast more than a reasonable doubt that Gary alone was guilty. The letters and testimony were excluded solely because of the Florida Voucher Rule which sanctified Linda's testimony from attack by Gary.
>
> As I perceive the due process principle announced in *Chambers*, it commands that every material source of evidence as to what was said and done by the principal players in this domestic tragedy should be laid before the triers of fact. 512 F.2d at 93.

3. Contrary to the conclusion of the court below, the repeated applications of the voucher rule in the instant case deprived the petitioner of his due process right to present a defense.

In addition to misapplying *Chambers*' facts, the Fifth Circuit has misinterpreted and misapplied *Chambers*' rule of law. The court below conceded:

> The application of the Voucher Rule in Maness' case undoubtedly worked to his detriment. Some evidence which suggests his innocence was excluded. 512 F.2d at 92.

The court, however, concluded that, under all the facts and circumstances, the application of the voucher rule had not made the petitioner's defense less persuasive to such a degree that his right to a fair trial was violated. 512 F.2d at 91, 92.

Given the numerous, significant mistakes of fact and law reflected in the Fifth Circuit's opinion, its conclusion must be approached with circumspection. It is submitted that, under the actual facts and circumstances reflected in the record before the Fifth Circuit, the only proper conclusion is that the petitioner's trial did not meet the "fundamental fairness" test.

The factors to be considered in determining whether the proceedings *sub judice* .were fundamentally fair are: 1) the validity and value of the particular evidentiary rule in question, and 2) the impact of the application of the rule on the petitioner's right to present a defense. *See Chambers* at 295. An analysis of each of these factors compels the conclusion that the petitioner was deprived of a fair trial. It was fundamentally unfair for the Florida trial court to exclude evidence which suggested the petitioner's innocence by applying a state evidentiary rule which serves no legitimate state interest whatsoever.

With regard to the validity or value of the voucher rule, the court below noted that the common law voucher rule had been the subject of criticism by the federal judiciary and that its demise in the federal courts was at hand. 512 F.2d at 92. *See also* Rule 607, *Uniform Rules of Evidence.* This Court has made two observations with regard to the voucher rule which are significant in this context: 1) the rule "bears little present relationship to the realities of the criminal process"; and 2) "[I]n modern criminal trials defendants are rarely able to select their witnesses: they must take them where they find them." *Chambers*, 410 U.S. at 296. *See also Brooks v. Tennessee*, 406 U.S. 605, n. 2 (1972). The Ninth Circuit has characterized the voucher rule as a "pointless limitation on the search for truth." *United States v. Torres, supra* at 295. The Second Circuit has termed the rule pernicious and irrational:

> We do not limit our repudiation of the pernicious rule against impeachment of one's witness to instances in which the witness is an "adverse party" or "hostile." The search for truth is not to be confined by any such limitation, and, as Professor Morgan has aptly said:
>
> > "The fact is that the general prohibition, if it ever had any basis in reason, has no place in any rational system of investigation in modern society and all attempts to modify or qualify it so as to reach sensible results serves only to demonstrate its irrationality and to increase the uncertainties of litigation." I Morgan, Basic Problems of Evidence, page 64 (1954 Ed.) *United States v. Freeman*, 302 F.2d 347, 351 (2d Cir. 1962).

The impact that the evidentiary rule had on the petitioner's right to present a defense makes fundamental unfairness manifest in that the rule rendered the petitioner's defense substantially less persuasive than it would otherwise have been. The voucher rule was repeatedly applied to sanctify the testimony of a witness who was the only other suspect to the crime, which testimony was consistent with the prosecution theory of the case. It was crucial to the petitioner's defense to show that his wife's testimony was false, and that she had reason to lie. If the state trial court had permitted Gary to introduce Linda's extra-judicial oral and written statements, the jury might very well have disbelieved Linda's testimony and determined that there was a reasonable doubt as to Gary's guilt.

Balancing all of the facts and circumstances reflected in the record before the court below, its conclusion that the trial proceedings were fundamentally fair is obviously erroneous. A rule which has been properly characterized as irrational, pernicious, unrealistic, and

pointless cannot, consistent with "fundamental fairness," be permitted to exclude evidence of substantial value to the defense.

4. The unduly strict interpretation of the rationale of *Chambers* accepted by the majority opinion *sub judice* is inconsistent with the interpretation of *Chambers* made by the Ninth Circuit and the courts of numerous states.

The position taken by the Fifth Circuit in the instant case is inconsistent with the interpretation of *Chambers* adopted by the Ninth Circuit and by the courts of numerous states.

In *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973), the Ninth Circuit applied the *Chambers* rule and reversed a conviction where the trial judge had precluded the defense from impeaching its own witness. Torres, who had been charged with importing and possessing cocaine and heroin, called as a defense witness one Anselmo Lebron, the man who had been in the back seat of Torres' car at the time Torres was apprehended. Torres had testified that his jacket, in which the drugs were found, had been in the back seat of the car adjacent to Lebron. Lebron's testimony at trial was that Torres had worn the jacket during the entire trip. Torres then attempted to impeach Lebron's testimony by introducing Lebron's prior conviction for selling heroin. The trial judge refused to permit Torres to do this on the grounds that, absent surprise, one may not impeach his own witness. The Ninth Circuit, citing *Chambers*, reversed the conviction and held:

> It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the court had permitted Torres to introduce Lebron's record, the jury may have disbelieved Lebron's testimony and acquitted Torres.
>
> * * *
>
> [T]he rule against impeaching a party's own witness [is] a pointless limitation on the search for truth. *Id.* at 923.

There is a distinct parallel between the *Torres* rationale and the instant petitioner's position. Here, as in *Torres*, the petitioner attempted to impeach a witness who was a possible suspect in the offense in question. Both defendants attempted to show that the witness' testimony, which was consistent with the prosecution's theory of the case, was false and that the witness had reason to lie in order to avoid prosecution.

The *Torres* court concluded its opinion by observing that this Court in Chambers had "reversed a state conviction in which a defendant was not permitted to impeach his own witness." *Torres, supra*, at 924. It is submitted that under *Chambers*, a result equivalent to that reached in *Torres* is required in the instant case. *See Davis v. Alaska*, 415 U.S. 308 (1974).

In addition to the Ninth Circuit, numerous state courts have applied the rule of law of *Chambers* in various contexts. In each instance, the common denominator was the promotion of the fundamental right to present a defense.

In a case involving a direct clash between the voucher rule and the right to present a defense, the Supreme Court of North Dakota applied *Chambers* and *Davis v. Alaska* and declared that the voucher rule should be abandoned completely. *State v. Hilling*, 219 N.W.2d 164, 172 (N.D. 1974).

Various states have permitted the prosecution to cross-examine and impeach its own witnesses, state

voucher rules to the contrary notwithstanding. In *State v. Lewis*, 523 P.2d 1316 (Ariz. 1974), the Supreme Court of Arizona affirmed a murder conviction and held that the prosecution had the right not only to cross-examine its own witness, but to impeach its own witness by prior inconsistent statements. The court stated:

> We agree with the recent statement of the United States Supreme Court that 'whatever validity the 'voucher' rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process.' [citation omitted]. *Id.* at 1318.

In *Gray v. State*, 525 P.2d 524, 525-26 (Alaska 1974), the prosecution was also permitted to impeach its own witness by prior inconsistent statements.[9]

Both *Lewis* and *Gray* reach results consistent with this Court's opinion in *Chambers.* It is submitted that if, under *Chambers*, the prosecution can impeach its own witnesses, *a fortiorari* the defense must also be permitted to do so. This is especially true where, as here, the attempted impeachment concerns a matter crucial to the defense theory of the case.

Chambers has been applied by a number of state courts to promote the right to present a defense, separate and apart from the area of impeachment, even where the evidence sought by the defendant was otherwise privileged. The Supreme Courts of New Jersey and North Carolina have each applied *Chambers*

[9] In *Patterson v. State*, 321 A.2d 554 (Md. 1974), the court, upon motion by the state, called a witness as the court's own, for the express purpose of permitting the state to circumvent the voucher rule's prohibition against a party impeaching its own witness.

and reversed convictions where the defense was improperly prevented from obtaining evidence which, although exculpatory of the defendant, was protected by the Fifth Amendment.[10]

In *State v. Jamison*, 316 A.2d 439 (N.J. 1974), an accomplice, during a recess in the defendant's jury trial, insisted upon confessing that he, rather than the defendant, had committed the crimes with which the defendant had been charged. The accomplice had previously been thoroughly advised of his rights. Nevertheless, the trial court, *sua sponte*, assigned counsel for the accomplice in order to further advise him of his privilege against self-incrimination. After receiving the advice of court appointed counsel, the accomplice

[10] *See also* Justice Holohan's specially concerring opinion in *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976), wherein he analyzes the clash between the values represented by the attorney-client privilege on the one hand, and the right to present a defense on the other:

> It is basic that an accused has the right to present a defense to a criminal charge, and, to accomplish this right, the accused has the right to compel the attendance of witnesses and the right to present their testimony. *Washington vs. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). Even a claim of privilege may have to give when faced with the necessity by the accused to present a defense. *Roviaro vs. United States*, 353 U.S. 53. . . .
>
> The problem of balancing competing interests, privilege versus a proper defense, is a difficult one, but the balance always weighs in favor of achieving a fair determination of the cause.
>
> A state's rules of evidence cannot deny an accused's right to present a proper defense. *Chambers v. Mississippi, supra.* In the case at issue, the interest to be protected by the privilege would seem to be at an end because of the client's death. I believe that the constitutional right of the accused to present a defense should prevail over the property interest of a deceased client in keeping his disclosures private. *Id.* at 1088.

retracted his confession. In reversing the defendant's conviction, the Supreme Court of New Jersey stated:

> A confession by another is of such probative importance in a criminal trial that its exclusion, or the unreasonable impairment of an attack on its repudiation, although sanctioned by local evidence rules, has been held a denial of the defendant's due-process right to a fair trial. *Chambers v. Mississippi* [citation omitted]. We are of the firm opinion that the diversion by this aspect of the proceedings below of the prospective testimony in the defendant's favor, taken together with the other matters mentioned elsewhere herein, visited such harm upon the defendant's case as warrants reversal. *Id.* at 447.

In *State v. Alford*, 222 S.E.2d 222 (N.C. 1976), the court reversed a defendant's conviction for murder based on the trial court's denial of the defendant's motion for a severance of his trial from that of his co-defendant, Carter. Carter had confessed to the crime, but in his written confession had exculpated the defendant, Alford, by claiming that another individual, Waddell, was the co-perpetrator of the robbery and murders with him. Carter declined to take the stand and the state did not introduce his written confession. The court observed that although Alford could have called Carter as a defense witness, Carter could have refused to testify relying on his rights under the Fifth Amendment. Thus, the court observed that Alford was effectively deprived of evidence which would have corroborated his alibi testimony. In reversing Alford's conviction, the court cited *Chambers*, and held that because his alibi defense was rendered "less persuasive" than it would have been had Carter's statement been introduced, the denial of Alford's motion for severance constituted reversible error.

In that the rule of law of *Chambers* supercedes legitimate interests, in the instant case it should certainly supercede the questionable interests represented by Florida's voucher rule. Of course, neither the federal nor the state cases cited hereinabove are binding upon this Court, but the legal principles reflected therein are consistent with this Court's holding in *Chambers* and should be persuasive.

B. The Voucher Rule as Applied In The Instant Case Not Only Violates The Fundamental Fairness Standard Of The Due Process Clause Of The Fourteenth Amendment But Also Violates The Petitioner's Sixth Amendment Rights To Compulsory Process And Confrontation Made Applicable To The States Through The Due Process Clause.

The reversal of Chamber's conviction was predicated upon the conclusion that under the facts and circumstances of that case, the rulings of the trial court had denied Chambers "a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. However, it is submitted that application of a state voucher rule in a criminal case may deprive a defendant of his Sixth Amendment rights to compulsory process and confrontation, as applied to the states through the due process clause, without necessarily reaching the *degree* of interference required to support a finding of a deprivation of "fundamental fairness" under the Fourteenth Amendment.[11]

[11] The distinction between the degree of error necessary for a denial of "fair trial" on Fourteenth Amendment due process grounds, and the broader range of the various provisions of the Sixth Amendment as applied to the states through the Fourteenth Amendment due process clause, was recognized by the court below in *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. en banc 1975).

This Court observed in *Chambers*:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' 410 U.S. at 295.
>
> The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. 410 U.S. at 294.[12]

However,

> [T]he right to confront and cross-examine is not absolute and may, in appropriate cases bow to accommodate other *legitimate* interests in the criminal trial process. . . . *But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.* 410 U.S. at 295. (emphasis added)

In the instant case "the competing interest" is Florida's voucher rule. The rule has been described as "pernicious," "archaic," "irrational," and "potentially destructive of the truth gathering process."[13] Wigmore

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[12] In *Chambers* the Court made it clear that:

> The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." 410 U.S. at 297-298.

[13] *Chambers, supra* at 1046 n. 8. Indeed, the court below conceded that the integrity of the fact-finding process would certainly have been furthered if the petitioner had been allowed to cross-examine his wife. 512 F.2d at 91.

calls it "a primitive notion, resting on no reason whatever, but upon mere tradition." *See State v. Hilling, supra* at 171-172.

Thus, the voucher rule cannot be said to promote a "legitimate" state interest which may permissibly "compete" with a defendant's Sixth Amendment rights to confront and cross-examine and to which those rights must sometimes "bow." *See Chambers, supra* at 295. It is submitted that the only constitutionally sound rule would prohibit the application of a state voucher rule in *any* instance where the defendant attempts to compel, cross-examine or confront any witness in order to develop his theory of the case. *Cf. Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). Simply stated, if the sought cross-examination is otherwise relevant and material to the defense theory of the case, the voucher rule should not be permitted to frustrate the defendant's realization of those Sixth Amendment rights.

There is an abundance of authority, both prior and subsequent to *Chambers*, supporting the proposition that the rights to compulsory process, to present witnesses on one's own behalf, and to confront and cross-examine are constitutionally guaranteed to a defendant in a state criminal trial.[14] *Davis v. Alaska*, 415 U.S. 308 (1974); *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Braswell v. Wainwright, supra; see generally* the cases collected in P. Westen, "The Compulsory Process Clause," 73 *Mich L. Rev.* 71 (1975), and "Compulsory Process II," 74 *Mich. L. Rev.* 191 (1975).

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[14] These rights have also been broadly recognized as fundamental aspects of the due process right to be heard in a meaningful manner in civil proceedings. *See Goldberg v. Kelly*, 397 U.S. 254 (1970), and the cases cited therein.

In *Washington v. Texas, supra*, the Court held that the right to compulsory process had been denied because a Texas statute arbitrarily deprived the petitioner of the right to put on the stand a witness who was capable of testifying, and whose testimony would have been relevant and material to the defense.[15] The Court observed:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. 388 U.S. at 19.

The Court concluded that the right to use a witness' testimony is implicit in the right to summon him. Clearly, the petitioner was denied these rights in the instant case.

The Fifth Circuit, applying the rule of *Washington v. Texas*, has held that when the application of a state procedural rule conflicts with a criminal defendant's Sixth Amendment right to compulsory process in obtaining witnesses, the state rule must yield. *Braswell v. Wainwright, supra* at 1154.

In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court reiterated that "the right of cross-examination is 'one of the safeguards essential to a fair trial'," and observed:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial

[15]The Court explicitly excluded from the purview of its opinion "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them" *Washington v. Texas, supra* at 23 n. 21.

> of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.
>
> Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. [citing *In re Oliver*, 33 U.S. 257, 273 (1948)], *Id.* at 404-405.

See also Chambers v. Mississippi, supra; Barber v. Page, 390 U.S. 719 (1968); *Phillips v. Neil*, 452 F.2d 337 (6th Cir. 1971).

In *Davis v. Alaska, supra*, this Court concluded that a state criminal defendant had been denied adequate cross-examination and reversed his conviction. The state trial judge had entered a protective order, based upon the state's interest in protecting the confidentiality of a witness' juvenile record, precluding defense counsel from cross-examining the witness (Green) regarding his record. The defense had opposed the entry of the order so that the defendant could attempt to show that at the same time Green was assisting the police in identifying the defendant; the witness was on probation for robbery. It was Davis' position that Green acted out of fear or concern of possible jeopardy to his probation. Green might have made a hasty and faulty identification of the defendant to shift suspicion away from himself, or might have been subject to undue police pressure and made the identification due to fear of possible probation revocation.

At trial, defense counsel sought to inquire into Green's state of mind at the time that he made the pretrial identification of the defendant. In response to defense counsel's questioning, Green denied any particular concern regarding the incident. The truthfulness of certain of his answers was problematical.

The Alaska Supreme Court affirmed Davis' conviction. This Court, in reversing, observed that: "It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination." *Davis*, 415 U.S. at 314. The Court declared:

> Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418. . . . (1965). *Davis*, 415 U.S. at 315.

The Court rejected the Alaska Supreme Court's conclusion that the defense was afforded adequate cross-examination as to bias, relying heavily on the principle that the jurors were entitled to be aware of the possibility of bias so that they could make an informed judgment as to the weight to place on Green's testimony. The Court then analyzed the circumstances which required this conclusion:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. *Davis*, 415 U.S. at 318.

Accord United States v. Torres, supra.

The circumstances which obtain in the case at bar are at least as compelling as those in *Davis* or *Torres.* When Linda Maness took the stand and testified adversely to the petitioner, her possible interest in the petitioner's conviction was far greater than that of the adverse witnesses in those cases. The only suspects in this battered child case were the victim's parents, the petitioner and Linda Maness. The state had not called Linda Maness as a witness. If the petitioner was not guilty of the offense, Linda Maness was the only remaining suspect and was subject to prosecution by the state. Yet Linda Maness was permitted to testify without fear of contradiction that she had left the petitioner alone with a healthy baby, that she returned to find the baby comatose, that the petitioner was not happy with their marriage, and that the petitioner had previously struck the child. The defense was precluded from inquiring whether the witness had filed for divorce from the petitioner, or inquiring into any denial of complicity or bias on the part of Linda Maness. (A. 92-93, 97)

In the instant case the only basis for the trial court's repeated exclusion of evidence exculpatory of the defendant was Florida's voucher rule. In *Chambers*, a combination of the voucher rule and the hearsay rule were deemed insufficient to outweigh the defendant's right to present a defense. *A fortiorari*, in *Maness*, Florida's voucher rule standing alone can not be deem sufficient to warrant infringement upon the petitioner's rights to compel, cross-examine, and confront, and thereby present a defense.

In the instant case, petitioner's entire defense was that he was innocent and his wife, Linda, the only other suspect, was guilty. (A. 25) His efforts to establish his innocence and her guilt by cross-examining and impeaching her were thwarted by application of

Florida's voucher rule. Without regard to whether the degree of interference would be sufficient to amount to a "fair trial" deprivation, it is submitted that the petitioner's Sixth Amendment rights were violated when petitioner was precluded from confronting and cross-examining Linda. This alone should be sufficient to mandate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-6909

GARY MANESS,
Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

INTRODUCTION

Pursuant to United States Supreme Court Rules 24 and 40(3), the respondent respectfully accepts those portions of petitioner's brief entitled "Opinion Below", "Jurisdiction", and "Constitutional Provisions Involved", as substantially true and correct.

STATEMENT OF THE CASE

A. The Proceedings In State Trial Court

Petitioner's argument is predicated on elevating alleged evidentiary error to constitutional magnitude by claiming that this alleged error rendered his entire trial fundamentally unfair. Petitioner's statement does not include a recitation of all pertinent testimony which was before the jury. Respondent, therefore, must provide a brief statement of the testimony, excluding therefrom tangential legal issues decided adversely to petitioner and not asserted in federal court.[1/]

1. The State's Case Against Petitioner, Excluding The Testimony Of Linda Maness And Gary Maness.

1/ Petitioner was convicted in 1971. As of June, 1976, he is living and undergoing parole supervision in St. Louis, Missouri.

Linda and Gary Maness were married in December of 1969. Linda stayed in Texas with her baby before joining Gary in Homestead, Florida on March 12, 1971. Immediately prior to Linda's arrival, Gary told a waitress in conversation that his marriage was a mistake. (A. 68-69, 135-136).

Madeline Keith met Gary once near the end of March, 1971, over at a friend's apartment in Homestead.[2/] Gary came into the friend's apartment. The friend asked to see the baby. Gary replied that she did not want to see the baby now "because it looks like it has been beaten <u>again</u>, but it really hasn't."[3/] The friend asked Gary

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2/ At the time of trial, Ms. Keith's friend, Mrs. McClain, was living in Ohio and was not an available witness. (A. 47, 80-82).

3/ This witness could not remember what Gary's exact words were. (A. 47).

what he meant. Gary replied that "it fell off our bed" and bruised the side of her face a few days ago, that the bruises were just becoming visible and that "we" were taking her to the hospital.

When Ms. Keith went to the car, she saw Linda and the baby, Misty, in the car. Gary was standing outside the car by the driver's side. Ms. Keith could tell that the baby was hurt. The baby was sitting in the car and "didn't look like it could move." "Its [the baby's] whole side of its face--its eye was all hurt and red and its nose was--I couldn't tell if it was broken or not, but it was pretty bad." Regarding the condition of the baby, Gary "was laughing about it and he says it looks like he's been beating it again." (A. 44-47, 49-50).

Gary borrowed Ms. Keith's car and subsequently returned two and one-half hours

later. Ms. Keith and her friend were taking Gary home. Only these three were in the car. The two women inquired as to what the doctor said. Gary told them that the doctor said that the baby was "okay", could be taken home, but should be brought back if the baby did not get better. Gary asked both women if they were married and said he could not understand being married, that married life was not for him, that he did not want the responsibility of married life and that he was planning a divorce as soon as possible. Gary further stated during this conversation that he "didn't really want the child, to care for it. . . ." (A. 47-48).

At least two or three weeks prior to April 14, 1971, a neighbor of the Maness family, who knew them only casually, heard the baby crying. This neighbor looked out

of her door and saw the baby throwing a temper tantrum in a car. Gary told this child to "shut up" and grabbed this baby by the left arm and jerked the infant to the back seat with a firm, hard jerk. (A. 57-58).

At approximately 6:00 p.m. on the evening of April 14, 1971, Linda and Gary brought the baby, Misty, into the emergency room at Homestead Air Force Base's hospital. The physician in charge saw the child immediately. The baby was completely comatose; i.e., was not responding to any stimulus whatsoever, and was limp with very labored respiration. The doctor observed multiple bruises about the face, one eye which was swollen closed, bruises around the shoulder and collarbone area, and some bruises on the lower extremities. He also observed that one arm appeared to be held at a grotesque angle. The doctor

suspected that the baby had a broken arm, a broken collarbone and a broken leg. The doctor also found a sign of a severe "inside-the-head" injury. During this diagnosis, the doctor asked what happened. Gary said that this baby "had a habit of beating itself against the side of the crib and also hitting itself with a bottle." The doctor talked to Gary because his wife appeared to be quite nervous and upset. Gary was acting "very nonchalant." (A. 34-37).

The doctor asked Gary to tell him the truth as to how this baby was injured and further stated that the baby did not sustain her injuries in the manner Gary described, that the baby was dying and that this doctor had to know how the injuries were sustained. Gary replied, "We didn't have anything to do with it." This doctor's

opinion was that the blows were not consistent with a fall in the crib, that the bruises were not consistent with striking one's self with a bottle and that it was "impossible" that a six or seven-month old child could beat itself with anything to sustain those injuries. Within a matter of moments this doctor contacted Jackson Memorial Hospital in Miami and arranged for emergency treatment. Linda was present when the doctor was questioning Gary but the doctor did not believe that Linda did any talking whatsoever. (A. 37-38).

An associate dean and professor of pediatrics at the University of Miami School of Medicine saw the baby, Misty, at Jackson Memorial Hospital at 11:35 p.m. on April 14, 1971. This infant was not responding to any type of stimulus and was comatose. Examination further revealed

multiple bruises covering the upper chest, shoulders and primarily the face and head. There were severe bruises around the outside of the eye. This baby's left arm was in a strange position and, even though there was very little spontaneous movement by the baby, it was obvious that this infant was not attempting to move that arm. (A. 39-40).

Tests eliminated the possibility that the infant had a bleeding disorder and led to the belief that the child's bruises must have been caused by some form of accident. The medical staff ruled out the possibility that the baby sustained this bleeding naturally or by accident and "it was the opinion of everyone who saw the child that it was a battered-child syndrome." This diagnosis was supported by discovery of a fracture of the baby's arm and a fracture of a leg, which latter fracture was "a healing frac-

ture which had been sustained, one, two or three weeks before." The pediatrician had seen about ten children who had been severely beaten but had "never seen a child beaten to this degree." (A. 40-43).

The pediatrician spoke to Linda and Gary and some time informed both parents that "protective custody" had been contacted. This pediatrician asked if these parents knew if the child had been in an accident or beaten up by somebody. Gary said that the child had been well until 4:00 p.m. o 5:00 p.m. when they noticed that the child was not responsive, not reacting normally, was breathing irregularly and might have been having convulsions. Linda stated "virtually the same thing." "They" said that the child was well until that afternoon when the mother left the house and was gone for a period of two, three or

four hours. [Note: This statement was made on the day of the crime, twelve days before Gary's confession and before any police statements were given by either Linda or Gary.] Both parents gave the same explanation as to the bruises on the face; i.e., that the child hit itself with the bottle or would bang itself against the crib or floor. The degree of injuries sustained by Misty was not consistent with this pediatrician's observations of other children who had fallen from high places, hit themselves with bottles, fallen against a crib or just tumbled over. This and the parents' denial of a car accident resulted in ruling out self-infliction or accident as the cause of the injuries. (A. 40-42).

The witness, a pediatrician and professor of medicine, explained the battered-child syndrome as child beating which could

take many forms, including loss of temper or control by some individual, which behavior would be repeated "most of the time." Common evidence of this phenomenon other than bruises is fractured bones. This pediatrician's investigation into past battered-child syndrome cases revealed past incidents of violence by the perpetrator "most of the time." Past acts of violence against the child would be consistent with the battered-child syndrome. (A. 42-44).

The medical examiner's office conducted a post-mortem autopsy of the baby, Misty, on April 19, 1971. This examination led to the following observations and conclusions. The body bore several marks of violence. There were bruises covering the entire left half of the face, which were more prominent on the cheek, tip of the nose

and forehead, and similar bruises on the right side. Bruises and infection were also observed on the outside and inside of the lips. Internal examination revealed a patchy area of bleeding inside the head behind the surface of the brain "as a result of the trauma to the left side of the face." There was a "spiral type" fracture of the left arm which was a fairly recent fracture approximately four days to two weeks old and which type of fracture is commonly seen in a twisting of the arm. In addition, there was a complete "healing" fracture of the right leg which was a minimum of three weeks and a maximum of six weeks old. The cause of death was "blunt injury to the head and its subsequent complications"--"a combination of total injury to the head." Two minor slaps would not produce the bruises which were

observed, but severe blows with a fist or opened hand would. At the time the leg fracture was sustained, the child would show symptoms of injury such as crying and limitations on crawling and the person who moved the child should be able to suspect injury. (A. 27-34).

Gary gave a statement to one police officer on April 18, 1971, after being advised of his constitutional rights. On April 25, 1971, another officer went to the Maness residence and separately took Linda and later Gary to another location for an interview, advising both of their constitutional rights. The following information was obtained. To Gary's knowledge Linda had not abused the child prior to coming to Homestead on March 12, 1971. They had not utilized the services of a baby-sitter for the infant since March 12th.

Gary's explanation for the baby's injuries was that Misty had a habit of beating her head with a baby bottle as she was holding the nipple and had a habit of beating its own head against the crib which once before caused her to sustain bruises. The bruise marks on Misty's chest came from sleeping on the bottle on her stomach. Gary denied ever beating or killing the child and said that, to his knowledge, Linda had never beaten Misty. This police officer informed Gary that the baby died from a subdural hemorrhage and had a broken arm and broken leg. Gary denied knowing how these injuries were sustained. The officer denied telling Gary to tell the truth to keep her from going to jail. (A. 65, 71-76).

At 2:20 p.m. on the next day, April 26, 1971, the officer who interrogated Gary on the night before returned to the Maness

residence and arrested Gary. Gary was taken to the police station. While this officer was engaged in paper work regarding the arrest, Gary, after sitting quietly for a while, asked this officer what the consequences would be if he gave a confession. Gary's initial query of the consequences was not in response to any question which the officer asked him. After a warning form was signed and following a call to his wife, a court reporter was brought in and a statement taken at 4:30 p.m. After a transcript of the statement was typed up one hour later, Gary checked it for accuracy, made one or two corrections, and signed it. Prior to the statement the officer did not tell Gary that he hated to see Linda go to jail and did not tell Gary that he could help Linda by saying that he did it and that she had nothing to do with it. (A. 59-63, 76-79, 164).

Gary's statement in pertinent part was as follows: Gary recanted his first police statement. Gary stated that on April 14, 1971, his wife went to the store for a few minutes. The baby was crying. Gary went to the bedroom to give Misty a bottle, rocked her and "I guess I just lost my cool, like you said, and I slapped her twice" with his opened hand using a forward stroke and a back stroke. Gary put the blanket over Misty and waited for Linda to return. One half hour after Linda returned, Linda went to feed Misty, discovered Misty's condition and called Gary in. (A. 63-67, 165-168).

Gary also stated that he smacked Misty in the jaw once before. Gary denied knowing how Misty broke her arm but admitted once having Misty by the arm and sliding her across the seat of the car. Once in the car Gary smacked Misty's leg two times.

Regarding the first two trips to the hospital to treat Misty's bruises, these bruises "happened like we said, she bumped her head on the bed." Since March 12th Gary never saw Linda physically abuse Misty in any way but did see Linda spank Misty on her rear without excessive force. Linda said something once about Gary's striking the child but Linda never physically restrained Gary. Gary would send Linda out of the baby's room because the baby would not go to sleep as long as she could see Linda and, during one or two of the four times Linda was sent out, Gary spanked Misty. Regarding his temper, Gary "hollers alot" but engaged in nothing physical. Gary would "holler" at the baby and tell her to be quiet or lay down. The baby would cry once in a while when Gary picked her up but this did not really bother Gary.

Gary concluded his statement by saying that, since the beginning of the investigation, no officer or other person mistreated him or threatened or coerced him at any time in order to make a statement, that he gave this statement knowing his constitutional rights and that this statement was given freely and voluntarily. (A. 67-71, 168-172).

2. The Defense's Case

   a. Linda Maness' testimony, excluding procedural facts pertaining to the attempted impeachment of Linda.

Linda denied killing or striking Misty in the face or head. When Linda awoke on the morning of April 14, 1971, Gary had already gone to work. Linda noticed a bruise on Misty's forehead for the first time that morning but did not know or tell anyone how this bruise was obtained. At this time,

Misty was fine and healthy, although she favored her left arm. Gary came home about one or two hours after Linda woke up. "We" went to pay the rent for the television, returned around noon, fed and put the baby to bed, and "we" sat and watched television until around 4:00 p.m. when Linda walked down to the corner store. When Linda returned, she went to feed Misty and found her in the same condition which Misty was in when taken to the hospital. Linda called a neighbor, who was a nurse and who suggested that Misty should be taken to the hospital. Gary said that they should wait for a while. (A. 84-88).

At the hospital Linda did not tell anyone how Misty was injured because she did not know. Linda first noticed bruises on Misty's head in March but did not know how Misty obtained them. "We" took Misty to

the hospital for treatment. Linda did not know how Misty hurt her arm but did notice that Misty was babying it. Linda did not know that the infant had hurt its leg until after Misty died. Linda found some bloody baby blankets prior to the day of the incident, which became bloody because Misty had a cracked gum. Linda denied seeing Gary do anything to Misty. Linda admitted lying to the police in her first statement when she said that Gary never slapped Misty anywhere but on her "butt". (A. 88-97, 99-100).

During cross-examination by the State, Linda testified that while on route to pay for the television on April 14th, Gary took the baby from Linda and, when the baby kept crying, Gary hit her twice on the face. Linda's trip to the store took ten to fifteen minutes and it was only after that

trip that Linda noticed other bruises on Misty's face. Linda had no problems with Misty before Linda came to Miami. One week prior to April 14th while the three were returning home from the hospital, Gary slapped Misty on the leg, because this infant was kicking her legs, and thereby caused a red mark to appear. When Linda tried to pick the baby up, Gary slapped Linda. Misty did not favor her leg after this. When Gary asked Linda to leave, he told Linda that he was not ready to be married and did not want to be tied down, that Linda would be better off at home, and that she should take Misty with her. Linda testified that prior to giving birth to Misty and while living in Texas, Gary picked up a "crying" puppy which Linda was playing with and threw it across the room into a box, hurting one of its legs. Linda

did not recall how many times Gary lost his temper but knew it was more than twice. (A. 97-99).

b. Gary Maness' testimony.

Gary denied killing Misty or striking her in the face "at any time." After returning from work on April 14th during which time Gary purchased a teargas gun, Gary noticed a bruise on Misty's forehead, did not know how it got there, and asked Linda, who said she did not know. Gary obtained ice and a washrag and applied it to Misty's head. After Linda and Gary returned from paying for the television, both were watching television until an argument arose about having another baby, which Gary wanted but Linda did not. Gary became mad and went outside and shot off the teargas gun until Linda came out and said she was going to have another baby. Both returned to the

house and watched television until Misty was discovered in her mortal condition. Gary washed the baby's face but Misty did not respond. Linda said she would get the girl to come down from upstairs. When this girl suggested seeing a doctor, Gary called a co-worker to take them, but he never came. While at Jackson hospital Gary went down to fill out papers, during which time the doctors talked to Linda alone. Linda told Gary that the doctors "said they wanted her to say I beat the baby." Though Gary did not know or see Misty do so, he did tell the doctors that Misty had a habit of hitting her head against the crib. Gary's knowledge of this was based on what Linda told him. (A. 100-103).

Gary's version of the incident with Mrs. McClain was that he said that Misty looked like she had been in a fight and

lost and "we all kind of laughed about it." On returning from the hospital at this time, Linda slapped Misty twice "pretty hard" on the right leg; Gary told her to stop; Linda refused saying it was her baby, and Gary slapped Linda. (A. 104-105).

Gary noticed that Misty couldn't hold her bottle for a while. When Gary asked Linda what was wrong, Linda said that she found Misty's arms stuck through the bars of the crib. (A. 105).

After both Linda and Gary returned from burying Misty in Tennessee, a police officer came to the house the next night and questioned both Linda and Gary. This officer accused Gary of killing the baby and said that Gary lost his cool and slapped Misty while Linda went on her trip to the store. Before Gary was dropped off, the

interrogating officer told Gary to remember "what he said about my wife if I wanted to help her out." Gary then asked Linda what she had told the officer. Linda said that she told them that she went to the store and left Gary alone with the baby. [Note that this story was also related to the pediatrician on April 14. The police interview in question occurred April 25.] Linda told Gary that she made this statement because Gary told her to do so. Gary told Linda to tell this story because the inspector, who talked to Linda and Gary, said that "one of us" would go to jail. Gary said that he would go because he did not want Linda and his baby to go to jail. Linda had informed Gary that she was pregnant while they were in Tennessee, and further made this assertion in letters which she wrote to Gary. (A. 106-108).

On the day Gary was arrested, the interrogating officer told him that the only way he could save Linda was by confessing and stating that Linda had nothing to do with the crime. It was at this time that Gary called Linda and told her what he was going to say "because she was to go to jail too." Gary then requested a lawyer but was toid that if he saw a lawyer, "we won't talk to you no more about your wife." Gary then made his statement, solely to protect his wife. (A. 108-109, 119-121).

During State cross- and re-cross examination, Gary claimed that Ms. Keith, Ms. Kelly, the waitress, the police officer and Linda were all lying or mistaken when they testified to anything which would tend to incriminate him. Regarding his confession, the officer told Gary that he knew Gary committed the crime but that "my wife

would probably go to jail too." "He didn't say that she was going to. He said she would probably go to jail too. There was a good chance." Gary admitted striking Misty at various times. Gary rehearsed his confession to himself and was ready to make a statement if he had to. The "self-infliction" story was told by Gary to various people because that was what was told to him and what was true "as far as I know." (A. 109-119, 121-122).

At no time during Gary's testimony did Gary directly state that Linda gave Misty the fatal beating on April 14th even though he testified that both were at the house and together subsequent to the trip to pay for the television. Moreover, Gary's alleged impetus to confess was never expressed by Gary as motivation to protect Linda from goingto jail while Gary remained free.

Rather, according to Gary, Gary would go to jail, but Linda would "too". (A. 100-122).

3. Other Relevant Facts

Pursuant to agreement with the State Attorney, Gary went to take a lie-detector examination with polygraph expert Warren Holmes at his request on June 29, 1971. (R. 418, 419, 420). Following return of the guilty verdict, Gary's attorney told the trial judge prior to sentencing, "He went to Warren Holmes. He did not pass the lie detector test, but he testified under oath anyway." (A. 162).

Following the conclusion of the defendant's motion to suppress, defense counsel informed the trial court that the State was the one who brought Linda Maness to Florida

from Texas and that Linda was "the defendant's chief witness, but whom I haven't subpoenaed." (A. 17).

During closing argument, the defense attorney never affirmatively and directly argued that Linda gave the fatal beating to Misty on April 14, 1971. (A. 145-152).

B. The Proceedings Subsequent To The State Trial.

The respondent accepts petitioner's statement regarding proceedings occurring after the State court trial as being substantially correct but will amplify same in the argument portion of this brief to avoid redundancy.

SUMMARY OF ARGUMENT

I

Petitioner flagrantly violated the

statutory command of 28 U.S.C. § 2254 by presenting the federal courts with an entirely different factual argument than he presented to the state courts under circumstances where the addition of these facts changed petitioner's entire claim. Under these circumstances petitioner may not have his claim heard in the federal courts. Because petitioner still has at least one available remedy in the Florida courts the lower courts were correct in denying relief.

II

The rationale of Chambers v. Mississippi, 410 U.S. 284 (1973) was never intended to encompass the factual circumstances presented by the instant case. Petitioner was not precluded from presenting various items of evidence but for Florida's statutory

voucher rule. Rather, the evidence which petitioner desired to introduce was inadmissible pursuant to numerous Florida evidentiary rules of law. This Court has never held that a defendant can ignore rules of evidence. The fact that the evidence, which petitioner was precluded from introducing, rendered his defense less persuasive that it might have been does not warrant a change in this Court's position. All rules of evidence render less persuasive the arguments which could have been made, when these rules are applied to preclude evidence.

Moreover, since petitioner never affirmatively stated that his wife committed the crime and since petitioner never presented independent evidence that his wife ever abused their baby, the evidence which was

kept from the jury could not raise an evidentiary error to the magnitude of rendering petitioner's entire trial fundamentally unfair.

Petitioner improperly seeks to distort judicial proceedings by using the Due Process Clause as a sword and not a shield. The Constitution cannot be abused in this manner.

ARGUMENT

POINT ONE

THE FEDERAL DISTRICT COURT PROPERLY DENIED FEDERAL HABEAS CORPUS RELIEF TO PETITIONER WHERE PETITIONER FAILED TO PRESENT THE SAME FACTUAL ARGUMENT TO THE STATE COURTS WHICH HE PRESENTED TO THE FEDERAL COURTS IN A SITUATION WHERE THE ADDITIONAL FACTS HAVE THE EFFECT OF CHANGING HIS ENTIRE CLAIM: WHERE PETITIONER HAS AN AVAILABLE STATE REMEDY TO ASSERT HIS PRESENT CLAIM AND WHERE, AS A CONSEQUENCE PETITIONER HAS FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES BEFORE SEEKING FEDERAL HABEAS CORPUS RELIEF.

During his state court trial, petitioner never asserted to the trial judge that the trial court's evidentiary rulings were such as to deny petitioner due process of law, when petitioner sought to examine Linda, Dana and Ruth Maness. (A. 84-162). The minutes of the state trial court clerk reflect that petitioner never filed a motion for a new trial and, therefore, never presented the issue sub judice to the state

trial court judge at all. (R. 414-415).

Following the filing of his notice of appeal to the District Court of Appeal of Florida, Third District and pursuant to the requirements of Florida appellate procedural law, Fla. App. Rule 3.5, petitioner filed assignments of error to give notice of the trial court errors which he would litigate on appeal. Assignments number eight (8) and nine (9) claimed trial court error in denying petitioner's motion to question Linda Maness as a hostile witness and in excluding the testimony of Dana and Ruth Maness relating to conversations with Linda Maness. No mention was made of Linda's letters. Petitioner did not assign error to these rulings on constitutional grounds. (A. 173).

When petitioner filed his brief in the

state appellate court, petitioner limited the pertinent issue, which he presented for review, to the exclusion of Dana Maness' testimony. His statement of material facts and his factual argument on the pertinent issue made only casual reference to the events which occurred during Linda's testimony, no mention of the letters allegedly written by Linda and no reference to the exclusion of Ruth Maness' testimony. Petitioner was conspicuously silent as to any claimed error regarding evidentiary rulings during Linda's testimony, was conspicuously silent as to any claimed error regarding the inability to use letters allegedly written by Linda, was conspicuously silent as to any claim of error regarding the exclusion of Ruth Maness' testimony and was conspicuously silent as to any assertion that these rulings collectively with the exclusion of Dana Maness' proffered testi-

mony had the effect of rendering petitioner's trial so fundamentally unfair as to constitute a miscarriage of justice of constitutional magnitude. (A. 175-178, 179, 182-183). Moreover, petitioner never sought to include the "bunch" of letters, which were referred to during Linda's testimony, in the state court appellate record, given that these letters were never marked for identification, never formally offered into evidence and never read into the record as part of a proffer. (A. 88-90; R. 1-447).

On May 30, 1972, the state appellate court rendered its decision in petitioner's case. This appellate opinion shows that that court predicated its decision on the pertinent issue solely on state evidentiary law, thereby giving clear indication that it was not addressing the pertinent issue as a constitutional question. (A. 186-187).

On February 21, 1973, this Court decided Chambers v. Mississippi, 410 U.S. 284 (1973). At no time following his solitary state appellate court decision did petitioner seek any form of state post-conviction relief in the Florida state courts. Petitioner alleged this inaction in his federal habeas corpus petition. (A. 190). Instead, petitioner went directly to federal court to obtain relief in light of Chambers and filed his petition on October 23, 1973.[4/] Petitioner asserted to the federal court that his claim was predicated upon (1) refusal of the state trial court to declare Linda an adverse and hostile witness; (2) refusal to permit petitioner to introduce inculpatory and impeaching letters written by

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[4/] The appendix submitted in this case inadvertently fails to include the filing date of the petition. (A. 188). However, this filing date is reflected in the federal court record on appeal which was submitted to this Court.

Linda; (3) exclusion of proffered testimony of Dana Maness and (4) exclusion of the proffered testimony of Ruth Maness. Petitioner claimed that all of the above collectively in the context of his entire trial rendered that trial a denial of due process of law. (A. 195-198).

Petitioner Maness further stated that he could not obtain post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850.[5/] No assertion was made that petitioner was precluded from resorting to every means of post-conviction relief available to him in the Florida state courts. Petitioner then claimed that he had exhausted the remedies available to him in the Florida state courts. (A. 203).

[5/] This means of post-conviction relief will be discussed subsequently.

Respondent Wainwright answered the petition by asserting inter alia that petitioner "has not exhausted his presently available state remedies and has prematurely sought the Writ." Respondent argued that petitioner by-passed use of Rule 3.850 and that, because Chambers was decided after his direct state court appeal, Rule 3.850 was available to vindicate expanding constitutional doctrines. Respondent further expressed his position that "the subsequent and intervening expression. . .in Chambers. . .renders petitioner's present claim so clearly distinct from the claim he has earlier presented to the state court that it may fairly be said that the state courts have had no opportunity to pass on the claim." (A. 207-209).

The federal district court rebuffed

Respondent Wainwright and ruled that Chambers did not establish new principles of constitutional law, that "in his direct appeal the petitioner presented the Florida Appellate Court with a fair opportunity to apply the constitutional principles discussed in Chambers to the facts and circumstances of petitioner's case", and that petitioner fully exhausted his state remedies. (A. 214-215). The federal district court then denied relief on the merits of petitioner's claim. (A. 218).

Respondent did not cross-appeal the federal court order but, following the Fifth Circuit's order granting rehearing en banc and directing the filing of supplemental briefs, respondent argued that the lower court's denial of relief should be affirmed for failure to exhaust available state remedies. The case terminated in

the Fifth Circuit without discussion on whether petitioner had exhausted available state remedies before seeking federal habeas corpus relief.

A. Petitioner Failed To Exhaust Available State Remedies Before Seeking Federal Habeas Corpus Relief.

1. The Florida state courts were never given a fair opportunity to address the same claim asserted by petitioner in the federal courts.

While at one time the federal habeas corpus doctrine of exhaustion of available state remedies was no more than a judicially created concept, Ex parte Hawk, 321 U.S. 114 (1944), federal courts are now required by legislative command to determine whether a state prisoner has exhausted available state remedies in every case before the power to grant relief is exercised.

Though this limitation on the exercise of the power is subject to narrowly crafted exceptions, such exceptions were never intended to be a loop-hole to denigrate federal-state comity. 28 U.S.C. § 2254; Pitchess v. Davis, 421 U.S. 482 (1975); Manning v. Alabama, 526 F.2d 355 (5th Cir. 1976). To satisfy the exhaustion requirement, the substance of the state prisoner's federal claim must be fairly presented to the state courts. It is not sufficient merely that the federal habeas corpus applicant has been through the state courts. Rather, the state courts must have the first opportunity to review the same claim he urges upon the federal courts. Pitchess v. Davis, 421 U.S. 482 (1975); Smith v. Goguen, 415 U.S. 566 (1974); Picard v. Connor, 404 U.S. 270 (1971). In Brown v. Allen, 344 U.S. 443, 447 (1953), this Court indicated that the phrase "same

claim" equates with the phrase "the same evidence and issues".

Where a petitioner bases his federal constitutional issue on relevant factual assertions never presented to the state courts and these factual allegations materially alter the nature of his claim or critically affect the determination of the issue so that the petitioner is in actuality presenting to the federal courts a materially different claim and stronger evidentiary case than that presented to the state courts, a petitioner cannot be said to have properly presented the state courts with a full and fair opportunity to rule on his claim and, therefore, has not satisfied the exhaustion requirement. Anderson v. Casscles, 531 F.2d 682 (2d Cir. 1976); Eaton v. Wyrick, 528 F.2d 477 (8th Cir. 1975); Gurule v. Turner, 461

F.2d 1083 (10th Cir. 1972); Daniels v. Nelson, 453 F.2d 340 (9th Cir. 1972); James v. Copinger, 428 F.2d 235 (4th Cir. 1970); United States ex rel. Figueroa v. McMann, 411 F.2d 915 (2d Cir. 1969); United States ex rel. Boodie v. Herald, 349 F.2d 372 (2d Cir. 1965) (vacating order denying claim on merits with instructions to dismiss without prejudice); Schiers v. California, 333 F.2d 173 (9th Cir. 1964); United States ex rel. Kessler v. Fay, 232 F.Supp. 139 (S.D.N.Y.1964); see United States ex rel. Cleveland v. Casscles, 479 F.2d 15 (2d Cir. 1973) (order granting relief vacated and remanded with instructions to dismiss without prejudice); United States ex rel. Rogers v. LaVallee, 463 F.2d 185 (2d Cir. 1972) (vacating order denying relief on merits with instructions to dismiss with-

out prejudice); Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Milton v. Wainwright, 396 F.2d 214 (5th Cir. 1968); Wyatt v. Oklahoma, 385 F. Supp. 562 (W.D.Okla.1974); Clark v. Nickeson, 321 F.Supp. 415 (D.Conn.1971). A technical "paper" presentation of an issue to the state courts does not equate with a meaningful opportunity, both factually and legally, for the state courts to address the federal constitutional issue. Mobley v. Smith, 443 F.2d 846 (5th Cir. 1971). This has been recognized as a valid interpretation of the concept of exhaustion of state remedies by this Court in Picard v. Connor, 404 U.S. 270 (1971).

Did Petitioner Maness present the Florida state courts with a full and fair opportunity to rule on the same claim (i.e., same evidence and same legal issue)

which he presents to the federal courts? The only candid answer to this question is "No!" Such is true for several equally important reasons.

First, in the federal courts petitioner has centered the challenge to his conviction on the adverse evidentiary rulings occurring during Linda's testimony, buttressing them by rulings regarding the exclusion of the testimony of Dana and Ruth Maness. On direct appeal in the state courts petitioner relegated the rulings during Linda's testimony and that ruling involving Ruth Maness to nothingness by his own factual statement of the case and argument concerning the exclusion of Dana Maness' testimony. Petitioner told the Florida courts to look at his legal issue solely in terms of the ruling regarding Dana Maness. In fact, petitioner proce-

durally defaulted on any complaint regarding the rulings involving Linda and Ruth Maness. Although assigning error to these latter rulings, petitioner did not argue them in his brief. Florida has always taken the position that assignments of error not argued in a brief are deemed abandoned unless the appellate court sua sponte discovers a jurisdictional defect or fundamental error.[6/] Fla. App. Rule 3.7(i);

6/ This principle of appellate law serves a valid state interest by (1) assuring prompt litigation of issues that could necessitate retrial so that in such a case witnesses and physical evidence are available and memories do not fade; (2) avoiding imposing a time-consuming duty on an appellate court to partially--as opposed to impartially--review every criminal appellate record for every imaginable "Achilles' heel"; and (3) bringing finality to criminal litigation.

Petitioner cannot by-pass this procedural default by claiming that the Florida appellate court should have recognized this non-asserted claim as fundamental error because to do so is to admit that the issue

State v. Mayhew, 288 So. 2d 243 (Fla. 1973); Tracey v. State, 130 So. 2d 605 (Fla. 1961); Redditt v. State, 84 So. 2d 317 (Fla. 1955); North v. State, 159 Fla. 854, 32 So. 2d 915 (1947); Holland v. State, 39 Fla. 178, 22 So. 298 (1897); Wade v. State, 184 So. 2d 462 (Fla. 2d D.C.A. 1966). By abandoning these issues and minimizing their importance to his state appellate claim, the issue which was presented to the state appellate court came there in a totally different light.

Second, in this Court petitioner poses as his single most important fact a "bunch of letters" allegedly written by Linda Maness, which he equates with the confession of McDonald in Chambers. During

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he is presently asserting can still be raised in the state courts by collateral attack pursuant to Florida Rule of Criminal Procedure 3.850. Clark v. State, 336 So. 2d 468 (Fla. 2d D.C.A. 1976).

petitioner's trial his defense attorney only showed the trial judge two of a "bunch of letters"--only one of which was identified by date. Although at trial the defense attorney alleged that these letters contained matters beneficial to petitioner's case, the trial judge characterized these two letters as "a bunch of love letters to her husband from a girl who loves her husband, no matter what he has done. It says so." Petitioner's attorney did not mark these letters for identification or make these two letters a part of his record on appeal to allow the appellate court to read them so that the difference of opinion as to their contents could be resolved. (A. 88-90; R. 1-447). In Florida an appellant may not present alleged error for appellate consideration upon an incomplete record if the omitted

matter might affect the determination of the reviewing court. Constantino v. State, 224 So. 2d 341 (Fla. 3d D.C.A. 1969). Without these two letters before it, the state appellate court was not presented with facts which petitioner, himself, designates as facts which would critically affect the determination of the issue he has presented in federal court.[7/]

[7/] At his state trial petitioner made use of only two letters--one dated April 28, 1971, and one of an unspecified date. These two letters were to be used solely for impeachment. Petitioner never marked any letters for identification and never offered any letters into evidence as substantive evidence over and above their use for impeachment. (A. 88-90). Consequently, in any post-conviction proceeding petitioner is limited to at best supplementing the record of his state trial with the same two letters used at trial and, then, with the further limitation that they can only be used in the same manner and for the same use to review the same issue facing the state trial judge. Since petitioner had this "bunch of letters" of unknown quantity, content and authorship, at his trial, all of this "bunch" cannot be designated "newly discovered evidence."

The situation presented to this Court in the instant case is almost identical to that in Picard v. Connor, 404 U.S. 270 (1971). The only difference between Picard and this case is that in Picard the legal issue changed while here the material facts changed. Such is a distinction without a difference in assessing whether the state courts have been given a full and fair opportunity to litigate the same claim. Therefore, the result must be the same.

Respondent recognizes that the state courts have been denied a full and fair opportunity to litigate the same claim because of the procedural errors of petitioner's attorneys. However, petitioner cannot escape his predicament and avoid the exertion of any further effort to present his claim to the state courts because his attorneys put him in this position.

Such would make the State of Florida suffer for his errors. The onus of extricating himself from his dilemma lies with petitioner. Under these circumstances more than a mere assertion that he might not be able to again raise the same claim in the state courts should be required to entitle petitioner to have his instant claim reviewed by a federal petition for a writ of habeas corpus. See Francis v. Henderson, 425 U.S. 536 (1976).

2. Petitioner presently has at least one available state remedy to litigate the same claim which he has presented to the federal courts.

In federal district court petitioner asserted that he could not seek post-conviction relief in the Florida state courts because a proceeding pursuant to Florida Rule of Criminal Procedure 3.850 cannot be

used to litigate a point of law raised and decided on a direct appeal. Petitioner then claims that, as a consequence, he exhausted "the" remedies available to him. (A. 203). This assertion was incorrect.

Florida Rule of Criminal Procedure 3.850 was adopted from and is essentially verbatim to 28 U.S.C. § 2255. Case law interpretations of this federal statute are persuasive authority in interpreting Florida's rule. State v. Matera, 266 So. 2d 661 (Fla. 1972); State v. Weeks, 166 So. 2d 892 (Fla. 1964); Ray v. Wainwright, 151 So. 2d 825 (Fla. 1963); Dickens v. State, 165 So. 2d 811 (Fla. 2d D.C.A. 1964).[8/] As a general statement, Rule 3.850 is not a vehicle to raise grounds which could have or should have been presented on

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[8/] Rule 3.850 was adopted in 1963 and has previously been denominated Criminal Procedure Rule 1 and 1.850.

direct appeal and cannot be used as a substitute for a direct appeal. Fulford v. State, 311 So. 2d 203 (Fla. 3d D.C.A. 1975); Koedatich v. State, 287 So. 2d 738 (Fla. 3d D.C.A. 1974); Yanks v. State, 273 So. 2d 401 (Fla. 3d D.C.A. 1973); Spencer v. State, 259 So. 2d 512 (Fla. 3d D.C.A. 1972); Kish v. State, 253 So. 2d 889 (Fla. 3d D.C.A. 1971). While this interpretation of Rule 3.850 covers most trial errors, it does not preclude use of Rule 3.850 to present the state courts with the same claim which Petitioner Maness has asserted in the federal courts. Rule 3.850 was designed to consider claims on collateral attack that there has been such a denial or infringement of the constitutional rights of a prisoner so as to render the judgment vulnerable to collateral attack. Ratliff v. State, 256 So. 2d 262 (Fla. 1st D.C.A. 1972). The test which a particular claim

must pass to be one raised under Rule 3.850 is whether the alleged error is such as to have deprived the defendant of a fair trial when viewing the whole record. The mere assertion of a constitutional violation does not ipso facto satisfy this test. Reddick v. State, 190 So. 2d 340 (Fla. 2d D.C.A. 1966); Marti v. State, 163 So. 2d 506 (Fla. 3d D.C.A. 1964). Consequently, alleged errors which could have or should have been raised on direct appeal have been held cognizable under Rule 3.850. See, e.g., Cioli v. State, 303 So. 2d 82 (Fla. 4th D.C.A. 1974) (mental incompetency at trial); Burse v. State, 175 So. 2d 586 (Fla. 3d D.C.A. 1965) (prosecutorial comment on defendant's failure to testify); French v. State, 161 So. 2d 879 (Fla. 1st D.C.A. 1964) (denial of continuance which forced indigent defendant to trial without

allowing "last minute" court-appointed attorney a reasonable time to prepare defense). Where a claimed error of law is of such magnitude as to constitute a fundamental defect which renders a trial inherently a complete miscarriage of justice, that error can be raised on a collateral attack of a criminal judgment pursuant to Rule 3.850. Clark v. State, 336 So. 2d 468 (Fla. 2d D.C.A. 1976); see Davis v. United States, 417 U.S. 333, 346 (1973); Hill v. United States, 368 U.S. 424 (1962); Middlebrooks v. United States, 500 F.2d 1355 (5th Cir. 1974). Collateral attack is available in such circumstances because "fundamental" error renders the judgment void--not merely voidable. See McDaniel v. State, 219 So. 2d 421 (Fla. 1969); Cash v. Culver, 122 So. 2d 179 (Fla. 1960); cf. Potvin v. Keller, 313 So. 2d

703 (Fla. 1975); see also Fay v. Noia, 372 U.S. 391 (1963).

In the instant case, petitioner's federal court claim is of that quality which must be deemed an assertion of fundamental error. Petitioner asserts that he is entitled to a new trial not merely because evidentiary error was committed, but rather because that error in the context of his trial rendered his entire trial so fundamentally unfair as to constitute a miscarriage of justice. Consequently, under Florida law his present claim subjects his conviction to a Florida Rule of Criminal Procedure 3.850 collateral attack in spite of the fact that Petitioner Maness could have raised the same claim he is arguing in the federal courts during his direct appeal in the state courts.

It is true that the doctrine of res

judicata will preclude a criminal defendant from relitigating under Rule 3.850 an identical claim previously asserted in the appellate courts, where that claim was squarely presented, and actually decided, against the defendant. Lamberti v. Wainwright, 284 So. 2d 202 (Fla. 1973); State v. Biesendorfer, 244 So. 2d 147 (Fla. 4th D.C.A. 1971); Whitney v. State, 184 So. 2d 207 (Fla. 3d D.C.A. 1966); see Sanders v. United States, 373 U.S. 1 (1963); Boeckenhaupt v. United States, 537 F.2d 1182 (4th Cir. 1976).

Under Florida law, Petitioner Maness' attempt to avoid even an effort to return to the Florida courts by resort to the doctrine of res judicata must serve him for naught. A review of all the relevant facts concerning his state court appeal, as noted above, reveals that petitioner never raised his present claim in the state trial court,

never raised the same claim in the state appellate court and never had his constitutional claim actually decided by the state appellate court.

Assuming arguendo that Rule 3.850 is an inadequate or ineffective vehicle for asserting his present claim, petitioner can resort to a petition for a writ of habeas corpus in any Florida state court. Rule 3.850 has not superseded or abolished the common law writ of habeas corpus. Habeas corpus may still be utilized if it appears that a Rule 3.850 motion is inadequate or ineffective to test the legality of a defendant's detention. Art.I, § 13 and Art. V, Fla. Const.; Fla.R.Crim.P. 3.850; State v. Wooden, 246 So. 2d 755 (Fla. 1971); Hollingshead v. Wainwright, 194 So. 2d 577 (Fla. 1967); Evans v. State, 168 So. 2d 134 (Fla. 1964); Mitchell v. Wainwright, 155 So. 2d 868 (Fla. 1963); Tolar v. State,

196 So. 2d 1 (Fla. 4th D.C.A. 1967); McCormick v. State, 164 So. 2d 557 (Fla. 3d D.C.A. 1964); see United States v. Morgan, 346 U.S. 502 (1954); United States v. Hayman, 342 U.S. 205 (1952).

Assuming that neither of the above remedies is available to directly raise the exact claim in state court, petitioner can seek a belated appeal to raise the instant claim. It is apparent that he did not raise the same claim (same facts and same issue) on appeal in the state courts because of his attorney's actions.[9/]

[9/] Respondent assumes that petitioner did not participate in the decision of his court-appointed appellate attorney to raise a different claim in the state courts, to abandon issues regarding Linda and Ruth Maness and to present a different factual emphasis. Petitioner cannot argue otherwise, for if he did join in his attorney's actions, he is entitled to no federal habeas corpus relief. Murch v. Mottram, 409 U.S. 41 (1973).

Petitioner's state appellate attorney was court appointed. (A. 162). Failure of court-appointed appellate counsel to assert a patently arguable claim on direct appeal, which claim arguably "reeks with arguable merit," can entitle a criminal defendant to a belated appeal through a writ of habeas corpus on the ground of ineffective assistance of counsel. Ross v. State, 287 So. 2d 372 (Fla. 2d D.C.A. 1973).

In the federal district court, petitioner did no more than argue that one of several potentially available remedies was unavailable to him. The federal trial judge accepted this argument by assuming that no other state remedy was available. Such an assumption was improper. See Jennings v. Illinois, 342 U.S. 104 (1951). The federal statute, 28 U.S.C. § 2254, does not require that a particular state remedy be unavailable,

but that all remedies be presently available before a state prisoner can invoke the federal "Great Writ". Respondent submits that where doubt remains as to the present unavailability of a remedy, the petitioner must be required to exert some effort in the state courts to assuage that doubt. For the doctrine of exhaustion to be meaningful, the state courts--not the petitioner--must be given the benefit of the doubt. In the instant case Petitioner Maness had several available state remedies in order to present the state courts with the same claim which he desired to present in federal court.[10/] Petitioner did not

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10/ A decision that petitioner has not exhausted his available state remedies avoids the need to consider the federal constitutional issue he presents. If there is doubt whether Florida law provides a post-conviction remedy for petitioner under the circumstances of this case, this Court can and should certify

hide the fact that he did not even try to seek post-conviction relief. Rather Petitioner Maness recognized this doctrine only in the breach thereof. To consider petitioner's claim on the merits in this or any federal court bespeaks a low esteem for 28 U.S.C. § 2254 and the policy considerations upon which it is based.

B. Respondent Is Not Procedurally Barred From Affirming The Lower Courts' Denial Of Federal Habeas Corpus Relief On the Ground Of Failure To Exhaust Available State Remedies.

Respondent did not cross-appeal the judgment of the federal district court or cross-petition the judgment of the lower

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that question to the Supreme Court of Florida pursuant to Florida Appellate Rule 4.61, as it has done in the past. Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); see Jennings v. Illinois, 342 U.S. 104 (1951).

appellate court. Such does not preclude respondent from urging affirmance of the district court's denial of relief on the ground of failure to exhaust available state remedies for the following reasons.

Issues in controversy below are available to a respondent as grounds for affirmance of a lower court order. United States v. Carignan, 342 U.S. 36, 38 n. 1 (1951); compare Tennessee v. Dunlap, ___ U.S. ___, 96 S.Ct. 2099, 2102 n. 3 (1976). Clearly, respondent contested the exhaustion issue both by his response in the federal district court and his supplemental brief filed in the lower appellate court.

If it appears in the record, the prevailing party may assert any ground in

support of a judgment without the need to cross-appeal or cross-petition, although his argument may involve an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it. Massachusetts Mutual Life Ins. Co. v. Ludwig, ___ U.S. ___, 96 S.Ct. 2158 (1976); Fusari v. Steinberg, 419 U.S. 379, 387 n. 13 (1974); Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970); United States v. Raines, 362 U.S. 17, 27 n. 7 (1960); Jaffke v. Dunham, 352 U.S. 280 (1957); United States v. Ballard, 322 U.S. 78 (1944); Langnes v. Green, 282 U.S. 531 (1931); United States v. American Railway Express Co., 265 U.S. 425 (1924); 9 Moore's Federal Practice § 204.11(3) (2d Ed). Respondent's exhaustion argument would result in affirmance of the lower courts' denial of relief to Petitioner Maness even

though the district court addressed the merits of petitioner's federal habeas corpus claim. See Milton v. Wainwright, 396 F.2d 214 (5th Cir. 1968). Consequently, failure to cross-appeal or cross-petition does not constitute a procedural bar to respondent's assertion in this Court of this important issue.

Respondent recognizes that there is an exception to the aforementioned rule. Where the losing party has nevertheless received some affirmative relief of substance from the judgment, an appellee-respondent must cross-appeal or cross-petition to enlarge his rights under the judgment or take away from the appellant-petitioner that matter of substance which the appellant-petitioner received below. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 n. 11 (1975); United States v.

Reliable Transfer Co., Inc., 421 U.S. 397, 401 n. 2 (1975); United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 226 n. 2 (1975); Strunk v. United States, 412 U.S. 434 (1973); Swarb v. Lennox, 405 U.S. 191 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n. 4 (1970); Nat'l. Labor Relations Bd. v. Express Pub. Co., 312 U.S. 426 (1941); Morley Const. Co. v. Maryland Casualty Co., 300 U.S. 185 (1937); see Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973). However, in the instant case respondent's argument that petitioner has failed to exhaust available state remedies does not enlarge respondent's rights under the district or appellate court judgments. Petitioner cannot assert that he received something of substance from the district court's erroneous determination that petitioner had exhausted available state remedies

in light of the fact that petitioner has consistently been denied relief on the merits of his present claim in both of the lower federal courts. Respondent submits that a "right" to proceed to lose on the merits is not that type of "right" which falls within the exception to the general rule, if such may be construed as a "right" at all.

Assuming arguendo that respondent should have cross-appealed or cross-petitioned, nevertheless respondent respectfully submits that this Court can and should address the instant exhaustion issue because of its quasi-jurisdictional nature. See Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964); United States ex rel. Wissenfeld, 281 F.2d 707 (2d Cir. 1960); cf. Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974) (exhaustion of administrative remedies).

Scrutiny of whether a federal habeas corpus petitioner has exhausted available state remedies must be of concern at every level of the federal court system if the statutory command is to be effective.

POINT TWO

PETITIONER MANESS' STATE COURT TRIAL WAS NOT RENDERED FUNDAMENTALLY UNFAIR WHERE PETITIONER WAS PRECLUDED FROM UTILIZING VARIOUS ITEMS OF EVIDENCE BECAUSE OF NUMEROUS STATE EVIDENTIARY RULES OF LAW WHICH WARRANTED EXCLUSION OF SAID EVIDENCE UNDER THE CIRCUMSTANCES OF THIS CASE.

Petitioner Maness seeks to obtain a new trial in the Florida courts on the theory that his state court trial was fundamentally unfair because he was precluded from presenting various items of evidence to create a reasonable doubt of his guilt. Petitioner claims that this evidence would have been admitted but for an arbitrary application of Section 90.09, Florida Statutes (1971),

Florida's voucher rule. Petitioner asserts that his case is so similar factually to Chambers v. Mississippi, 410 U.S. 284 (1973) that he is entitled to a similar ruling in his favor.

Respondent Wainwright submits that a detailed analysis of what occurred at petitioner's trial will demonstrate that petitioner's position only superficially approaches the factual and legal circumstances which warranted the result in Chambers and that the instant case does not fall within Chambers' rationale. Rather, the record of petitioner's state court trial reveals that petitioner's excluded evidence was properly kept out because it failed to satisfy numerous principles of Florida evidentiary law. Moreover, any arguable error in excluding this evidence did not

reach the magnitude of rendering petitioner's trial fundamentally unfair so as to violate the Due Process Clause of the Constitution. Petitioner presents a case that is but a hollow shell of Chambers.

A. Petitioner's Case Does Not Fall Within The Rationale Of Chambers.

1. What Chambers means as precedent.

Chambers involved a situation in which a defendant was precluded from presenting evidence by an arbitrary application of legal rules under factual circumstances which showed that the trial court's evidentiary rulings were erroneously made. Chambers did not involve a situation where a defendant was precluded by state evidentiary law from presenting a "smokescreen" defense theory to the jury. Rather, Chambers involved a situation where the

defense was precluded from showing who the real culprit was. Defendant Chambers presented a great quantity of quality evidence to support this defense.

Prior to the erroneous evidentiary rulings, Defendant Chambers introduced evidence through two disinterested witnesses that another man, McDonald, had a gun in his hand and shot the victim. Defendant Chambers also managed to get a written confession of McDonald introduced into evidence and read to the jury. After this the State elicited a repudiation by McDonald of his confession. Then, the trial court precluded Chambers from impeaching McDonald's repudiation by holding that McDonald was not an adverse witness. Following this Chambers was precluded from introducing three independent oral confessions which McDonald made to three

disinterested witnesses within one day of the shooting. This evidence was excluded as hearsay.

This Court held that "in the circumstances of this case" the trial court made two erroneous evidentiary rulings which in conjunction deprived Chambers of a fair trial by precluding Chambers from presenting evidence from which the jury could judge for itself whether McDonald's testimony was worthy of belief.

However, in terms of precedent this Court expressly stated in Chambers that "In the exercise of [the right of a defendant to present witnesses in his own defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment

of guilt and innocence." Chambers v. Mississippi, supra at 302. Moreover, this Court again clarified its ruling by stating, "Nor does our holding signal any diminuation in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." Chambers v. Mississippi, supra at 302-303. It is thus clear that Chambers does not hold that a trial judge is precluded from using state evidentiary law to preclude the admission of evidence which would support a defendant's defense in some way. Chambers did not hold that a state must throw away its rules of evidence when a defendant walks into the courtroom. See United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); Truman v. Wainwright,

514 F.2d 150 (5th Cir. 1975); People v. Gant, 58 Ill.2d 178, 317 N.E.2d 564 (1974); People v. Taylor, 35 Ill.App.3d 756, 342 N.E.2d 436 (1976); State v. Connor, 241 N.W.2d 447 (Iowa 1976). For example, Chambers did not hold (1) that a defendant can impeach a witness on collateral matters, (2) that a defendant can impeach a witness without laying a predicate for impeachment by a prior inconsistent statement or (3) that a judge cannot apply a "voucher rule" where a party's own witness is not adverse. Nor, did Chambers hold that the mere fact that the exclusion of defense evidence interferes with a defense or renders a defense far less persuasive than it might have been renders a trial fundamentally unfair. Obviously, such is the inevitable effect of any evidentiary ruling on the party against whom an evidentiary principle is invoked.

2. The trial judge did not arbitrarily and erroneously preclude the petitioner from impeaching the testimony of Linda Maness by use of Section 90.09, Florida Statutes (1971).

Petitioner claims that Section 90.09, Florida Statutes (1971), Florida's voucher rule, precluded petitioner from impeaching Linda Maness. Petitioner further asserts that Linda was clearly an adverse witness so that this statute was misapplied in his case.[11/] A review of the state court transcript

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11/ Florida's voucher rule is statutory. Petitioner spends much effort inferring that this statute is unconstitutional and that numerous jurisdictions do not use a voucher rule as part of their rules of evidence. See, e.g., United States v. Torres, 477 F.2d 922 (9th Cir. 1973). Such an argument is irrelevant to the instant case.

Chambers expressly declined to hold voucher rules unconstitutional. Since the petitioner has never attacked the constitutionality of Section 90.09, Florida Statutes (1971), this Court will not sua sponte hold this statute unconstitutional.

brings into question the strength of petitioner's assertions.

Petitioner called Linda Maness as his first defense witness. Immediately petitioner's attorney sought to impeach Linda before Linda had given any testimony either for or against petitioner. These questions were sustained on the ground that they were leading. During her direct testimony, Linda repeatedly maintained that she did not know how the baby was injured and that she did not see petitioner do anything to the baby. (A. 86, 88, 95-96). When petitioner attempted to use a bunch of letters

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See Beck v. Washington, 369 U.S. 541 (1962). Moreover, this Court has expressly declined to federalize the various state rules of evidence under the guise of the Constitution. See Dutton v. Evans, 400 U.S. 74 (1970); cf. Lisemba v. California, 314 Y.S. 219 (1941). Consequently, Florida and every other state may promulgate its own rules of evidence independently of any other sovereign.

to impeach Linda, the trial court reviewed the only two letters given to it and ruled that these two letters were merely love letters, showed that Linda was not an adverse witness, and that at this moment in the trial there was nothing which Linda had testified to which was inconsistent with the contents of these two letters. The trial court ruled that petitioner had to follow the rules of evidence and that Linda had not yet testified to anything for which she could be impeached. As to a failure of Linda to state in a prior police statement that she was out of the house, the trial court in essence stated that this silence under the circumstances was not an inconsistency. (A. 88-92). Thus, the record reveals that the trial court was not using the voucher rule to preclude petitioner from impeaching Linda at this time.

In light of the above testimony during petitioner's direct examination and in light of the testimony during the State's case-in-chief, Linda cannot be said to be an adverse witness at the only time that petitioner asked the trial court to so rule. Moreover, the trial court's rulings demonstrate that the judge was applying numerous evidentiary rules other than the voucher rule in precluding the questions being asked. Consequently, the trial judge was not saying "no" to the petitioner's impeachment, but rather "not now", "not with this letter" and "not until a predicate for impeachment has been established."

To show that Linda was adverse, petitioner has to use testimony which did not come out until after the requested ruling, i.e., the State's cross-examination and petitioner's subsequent testimony. How-

ever, the correctness of an evidentiary ruling must be determined in light of the circumstances at the time the ruling was requested and not by hindsight. United States v. Samuel, 431 F.2d 610 (4th Cir. 1970). Following the rulings in question, petitioner never sought to recall Linda and/or to renew his request to treat Linda as an adverse witness. (A. 97-137). Furthermore, when petitioner conducted re-direct examination of Linda, the petitioner did in fact impeach Linda by a prior inconsistent statement given to the police following the crime and received an admission from Linda that she lied in that statement. (A. 99).[12/] While it can be

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12/ Florida law provides that a party may circumvent an adverse affect from the statutory voucher rule if that party proffers to the trial court that it cannot vouch for a witness' credibility. See, e.g., Tillman v. State, 44 So. 2d 644 (Fla. 1950);

argued that Linda was an adverse witness when petitioner attempted to admit Dana and Ruth Maness' testimony, petitioner did not renew his motion to treat Linda as adverse. Moreover, as will appear below, this testimony was properly excluded under other evidentiary rules of evidence.

> 3. Assuming arguendo that the trial court erroneously applied Florida's "voucher rule" to the instant case at anytime, petitioner's case does not fall within the rationale of Chambers because the evidence which petitioner sought to admit was inadmissible under numerous principles of evidentiary law.

This Court found error in Chambers because it found that the defendant's precluded evidence was in fact admissible.

Chapman v. State, 302 So. 2d 136 (Fla. 2d D.C.A. 1974). Petitioner never sought to utilize this evidentiary rule.

It is obvious that if the evidence which petitioner sought to use to develop his defense was inadmissible under other rules of evidence, petitioner suffered no harm from the voucher rule. If a trial court rules correctly but for the wrong reason, such will not warrant reversal where that ruling was correct for other reasons. See Brown v. Allen, 344 U.S. 443 (1953); J. E. Riley Inv. Co. v. Comm'r. of Internal Revenue, 311 U.S. 55 (1940); Helvering v. Gowan, 302 U.S. 238 (1937); State v. Clyde, 299 So. 2d 136 (Fla. 2d D.C.A. 1974); State v. Alvarez, 258 So. 2d 24 (Fla. 3d D.C.A. 1972); Harper v. State, 217 So. 2d 591 (Fla. 4th D.C.A. 1968).

Other courts have looked carefully at a "voucher rule" ruling to determine whether the evidence sought to be admitted for impeachment is in fact admissible for impeach-

ment; Chambers notwithstanding. United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); Truman v. Wainwright, 514 F.2d 150 (5th Cir. 1975); Commonwealth v. Gee, 354 A.2d 875 (Pa. 1976).

a. The evidence which petitioner desired to use to impeach Linda was inadmissible under numerous rules of evidentiary law.

During Linda's direct testimony, petitioner attempted to impeach Linda by statements which Linda wrote in a bunch of letters to the effect that she was pregnant and that she "feels guilty about what she's done to the defendant." (A. 89). But, petitioner never asked Linda and Linda never testified inconsistently as to these matters. Petitioner withdrew the question of whether Linda told petitioner that she was pregnant on the day of the crime. (A. 92).

A witness cannot be impeached by a prior out-of-court statement unless there is in fact an inconsistency between what is testified to in court and the statement to be used for impeachment. Myers v. State, 43 Fla. 500, 31 So. 275 (1901); 3A Wigmore On Evidence § 1040 (Chadbourne rev. 1970); McCormick On Evidence § 34 (2d E.. 1972). Here, there was no inconsistent testimony at the time of the court's ruling regarding the letters.

Petitioner asked the court whether it could impeach Linda by the fact that she omitted stating that she was out of the house on the afternoon of the day of the crime; when she made a statement to the police following the baby's demise. The court ruled that although Linda already testified that she was out of the house there was no inconsistency, especially

since no one asked Linda about this matter at that time. (A. 90-92). [It should be noted that on the day of the crime both Linda and petitioner told the doctor at Jackson Memorial Hospital that Linda was out of the house during the afternoon in question, thereby precluding an argument that Linda's in-court testimony was a recent fabrication. (A. 41)]. Under the circumstances noted by the trial judge, Linda's silence in that statement was not an inconsistent "statement" to her in-court testimony. United States v. Hale, 422 U.S. 171 (1975).

The proffered testimony of Dana and Ruth Maness was likewise inadmissible for impeachment by a prior inconsistent statement. Dana's testimony allegedly would have been that Linda stated to Dana that

petitioner did not touch the baby, that she did not know what happened and that she never left her home to go to the store on the day in question. (A. 123). Ruth's proffered testimony was that Linda stated to her that the baby blankets became bloody because Linda had her period. (A. 124). This testimony was properly excluded as impeachment under the rule that before a witness can be impeached by a prior inconsistent statement, the witness must first be informed of the time, place and circumstances of the alleged statement and asked whether he or she made that statement. §90.09, Florida Statute (1971). Rowe v. State, 128 Fla. 394, 174 So. 820 (Fla. 1937); Seaboard Coast Line R.R. Co. v. Hunt, 299 So. 2d 84 (Fla. 1st D.C.A. 1974);

Urga v. State, 104 So. 2d 43 (Fla. 2d D.C.A. 1958); 3A Wigmore On Evidence §§ 1025-1039 (Chadbourne rev. 1970); McCormick On Evidence § 37 (2d Ed. 1972). Only if a witness first denies making the prior statement or fails to remember it can the making of that statement be proved by another witness. See Wingate v. New Deal Cab Co., 217 So. 2d 612 (Fla. 1st D.C.A. 1969). Here, petitioner never asked Linda about her alleged statements to Dana and Ruth Maness. (A. 84-97, 99-100). Furthermore, Ruth's proffered testimony was inadmissible because it was clearly an attempt to impeach Linda on a collateral matter. Patterson v. State, 157 Fla. 304, 25 So. 2d 713 (Fla. 1946); Herndon v. State, 73 Fla. 451, 74 So. 511 (Fla. 1917); see 3A Wigmore On Evidence §§ 1001-1003, 1020 (Chadbourne rev. 1970); McCormick On Evidence § 47 (2d Ed. 1972).

In light of the above law and facts the trial court properly precluded petitioner from impeaching Linda as he attempted to do.

b. The evidence which petitioner was precluded from using could not be admitted under a hearsay exception.

Under Florida law a prior inconsistent statement is not admissible as substantive evidence of the matters contained therein unless that statement is also admissible hearsay. Tomlinson v. Peninsular Naval Stores Co., 61 Fla. 453, 55 So. 548 (1911); Adams v. State, 34 Fla. 185, 15 So. 905 (1894); Thomas v. State, 289 So.2d 419 (Fla. 4th DCA 1972); Wallace v. Rashkow, 270 So.2d 743 (Fla. 3d DCA 1972); see 3A Wigmore on Evidence § 1018 (Chadbourne rev. 1970); McCormick On Evidence § 251 (2d ed. 1972).

Petitioner claims that the trial court precluded petitioner from introducing Linda's letters and that these letters in fact constituted a confession that Linda committed the crime. In contrast to petitioner's assertion in his brief, a review of the trial court transcript reveals that petitioner never sought to admit the letters as substantive evidence. Petitioner never marked these letters for identification, never formally offered them into evidence and never obtained a trial court ruling that these letters were inadmissible as substantive evidence. Petitioner only expressed a desire to admit these letters. (A. 88-92). Consequently, the state trial court record is devoid of an errorable ruling that these letters could not come in as substantive evidence of the matters contained therein. Respondent Wainwright

knows of no case in which reversal has resulted for failure to admit evidence that was never offered into evidence.[13]

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[13] Petitioner never presented the Florida appellate court or the lower federal district court with the bunch of letters which he contends were crucial to his defense. The Fifth Circuit record on appeal reveals that petitioner did not try to supplement the federal record on appeal with these letters until after the three judge opinion was rendered. The Fifth Circuit denied this motion. Petitioner presents this Court with these letters by way of the appendix to his petition for certiorari. These letters should not be considered other than insofar as the content of two letters appears in the state court transcript. Cuicci v. Illinois, 356 U.S. 571 (1958); United States ex rel. Stevenson v. Mancusi, 409 F.2d 801 (2d Cir. 1969).

Moreover, the state court record shows that only two letters were shown to the state trial court judge--only one of which was specified by date. Thus, there is no showing that the bunch of letters which petitioner attempts to present are the same letters which petitioner's attorney possessed on the day of petitioner's trial.

Finally, petitioner seeks to use these letters by arguing that sworn allegations as to the contents of the letters, which

The only evidence of the contents of these letters is a statement that Linda wrote that she was pregnant in her letter of April 28, 1971. (A. 88-89). Petitioner contends that this letter is admissible to show petitioner's state of mind in support of his testimony that he confessed because he did not want Linda to go to jail while carrying his baby. But, petitioner gave

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13 appeared in petitioner's habeas corpus petition, were not controverted by Respondent Wainwright. This statement creates a false impression. The habeas petition alleged no more concerning the contents of all of the letters than what appeared in the state court transcript. (A. 194-203). Moreover, respondent did not see these letters until after petitioner sought to supplement his Fifth Circuit record on appeal. Therefore, the respondent lacked both the need and the ability to controvert statements concerning letters exclusively in petitioner's possession.

his confession on April 26, 1971--two days before this letter was written. (A. 165). Consequently, the April 28, 1971 letter was irrelevant as support of petitioner's testimony. Petitioner could not have been influenced by a letter written two days after the event. Richert v. State, 338 So.2d 40 (Fla. 4th DCA 1976).

The proffered content of the unidentified letter to the effect that Linda "feels guilty about what she's done to the defendant" does not constitute a declaration against Linda's penal interest. Not only does this statement not assert that Linda did commit the crime but this statement also does not indicate that petitioner did not commit the crime. On this face, this statement would not in itself subject Linda to criminal liability. Linda's guilt feeling could easily be attributable to her

statements to the police which resulted in Gary's arrest. Moreover, this statement does not fulfill all of the requirements for admission of a declaration against Linda's penal interest. This letter was written weeks after the crime. There is no independent corroboration of Linda's guilt such as was found to exist in Chambers i.e. the written confession of McDonald and the testimony of two witnesses that McDonald had a gun and was seen shooting the decedant. Consequently, this letter was inadmissible hearsay. United States v. Barrett, 539 F. 2d 244 (1st Cir. 1976); United States v. Hughes, 529 F.2d 838 (5th Cir. 1976); United States v. Pena, 527 F.2d 1356 (5th Cir. 1976); United States v. Brandenfels, 522 F.2d 1259 (9th Cir. 1975); United States v. Wingate, 520 F.2d 309 (2d Cir. 1975); United States v. Harris, 501 F.2d 1 (9th Cir. 1974);

United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974). Petitioner's position that this and other alleged declarations against Linda's penal interest become admissible because one cross-corroborates the other is fallacious logic. Such would allow a defendant to create admissible evidence by combining two items of inadmissible evidence.

The proffered testimony of Dana Maness that Linda told Dana, petitioner's relative, that petitioner did not touch the baby, that she did not know what happened and that she never left the house to go to the store on the day of the crime likewise is not a statement rendering Linda subject to criminal liability. These statements were allegedly made while Linda and petitioner were burying the baby prior to petitioner's arrest. For the same reasons stated above this statement

cannot come in as a declaration against penal interests.

The proffered testimony of Ruth Maness that Linda stated that the blankets were bloodied due to her period is at best irrelevant as hearsay evidence.

In light of the foregoing, the evidence which petitioner was precluded from using was properly kept out by numerous principles of Florida evidentiary law. Consequently, petitioner cannot claim harm from any ruling predicated on Florida's "voucher rule" statute. Thus, petitioner's case does not fall within the rationale of Chambers.

B. Assuming Arguendo That There Was Any Error In Excluding Any Or All Of The Items Of Evidence Which Petitioner Sought To Use, Such Error

Did Not Reach The Magnitude Of Rendering Petitioner's Trial Fundamentally Unfair Under The Circumstances Presented By The Entire Trial Court Record.

To constitute a denial of due process it is not enough that a trial court rendered an erroneous evidentiary ruling. Rather, by reason of this error petitioner's trial must be rendered fundamentally unfair under the totality of the facts in the case. Maggit v. Wyrick, 533 F.2d 383 (8th Cir. 1976)

Petitioner Maness testified that he was at the scene during the time of the crime and was so close to his residence that he was able to testify that Linda did not leave their residence to go to the store. Petitioner was therefore in a position to testify that he saw or heard Linda commit

the crime or that he knew Linda had to have committed the crime. But, nowhere during petitioner's testimony did petitioner affirmatively state that Linda committed the crime. (A. 100-122). In addition petitioner presented no independent evidence from other witnesses that Linda ever abused the baby. As a result he excluded evidence could serve no more than to create an inference on Linda's guilt and confuse the jury. In light of the aforementioned circumstances any error in the trial court's evidentiary rulings cannot rise to the level of rendering petitoner's trial fundamentally unfair. Greenfield v. Robinson, 413 F.Supp. 1113 (W.D. Vir. 1976).

C. Strong Policy Reasons Support Respondent's Position.

The very essence of Petitioner Maness'

argument is that a defendant must be given free rein to present any evidence which in some way would support his defense in total derrogation of evidentiary rules of law. He seeks to threaten the trial courts with the Constitution, thereby turning a shield into a sword. Petitioner thereby seeks to place the various governments of this country in the following position: The government cannot admit evidence obtained in violation of a defendant's constitutional rights no matter how truthful and telling that evidence is. Furthermore, the government must tow the line regarding evidentiary law and, if it faulters, the defendant may press for reversal. But, when a defendant seeks to present evidence, nothing can stop him. He can act free of constraint while the government must passively stand by. The specter of such a situation is chilling.

The Due Process Clause does not apply to the government. But, the government is also entitled to a fair trial and is entitled to insure that the truth will out. The only mechanism which the government has to attain this end is its ability to use the rules of evidence to exclude false testimony, preclude confusion of the issues, and prevent the freeing of the guilty. The battle for justice must be fair to both participants. Anything less destroys the integrity of the judicial system by distorting a judicial proceeding.

The Constitution does not guarantee defense anarchy in a courtroom. As Mr. Justice Cardozo explained in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934):

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained to a filament. We are to keep the balance true.

For these reasons Petitioner Maness must not prevail.

D. Petitioner Maness Cannot Raise A Sixth Amendment Claim For The First Time In This Court.

The petition for a writ of habeas corpus which was filed in the lower federal court did not raise a claim that petitioner's Sixth Amendment rights were violated. Petitioner confined himself to an argument based on the Due Process Clause of the Fourteenth Amendment. (A. 188-203). Now, Petitioner Maness appends the Sixth Amendment to buttress his position. This he cannot do. Moore v. Illinois, 408 U.S. 786 (1972); Hill v. California, 401 U.S. 797 (1971).

CONCLUSION

This Court should affirm the decision of the lower courts which have denied relief to the petitioner for either of two reasons. First, petitioner failed to exhaust available state remedies before seeking federal habeas corpus relief, thereby vitiating the statutory command of 28 U.S.C. § 2254. Second, petitioner's attempt to fall within Chambers v. Mississippi, 410 U.S. 284 (1973) must fail because the rationale of Chambers does not apply to the factual circumstances of the instant case. The defense evidence excluded from petitioner's trial was properly excluded pursuant to numerous rules of evidence. Moreover, even if there was error in any particular evidentiary ruling, such did not render petitioner's trial fundamentally unfair under the circumstances of

his entire trial. Petitioner must not be allowed to utilize a "domino method of constitutional adjudication. . .wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Schneckloth v. Bustamonte, 412 U.S. 218, 246 (1973).

Respectfully submitted:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6909

GARY MANESS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. The Petitioner's Claim Is And Has Always Been Based Upon His Right To A Fair Trial, Compulsory Process, Confrontation, And Cross-Examination, As Guaranteed State Defendants By The Due Process Clause Of The Fourteenth Amendment.

The facts upon which the petitioner's claim is based are clear on the record and are dealt with in detail in the brief for petitioner. In summary, the facts are as follows: Upon calling Linda to the stand, defense counsel requested that the trial judge permit him "to question the witness as an adversary and hostile witness." (A. 85) This request was denied by the court.[1] (A. 85)

Defense counsel sought to have Linda admit her guilt and exonerate the petitioner. (A. 85-86) Linda refused to do either, and testified in a manner consistent with the prosecution's theory of the case.

Defense counsel then repeatedly tried to adduce other evidence which would have contradicted Linda. He tried to cross-examine her, and tried to introduce admissions she had made. He also tried to show that she had made inconsistent statements, to impeach her credibility. The trial court repeatedly applied the voucher rule to preclude the defense from adducing this evidence. (A. 85-86, 88-92, 96-97, 123-124)

The respondent repeatedly relies on the "fundamental fairness" standard, and states that the petitioner's claim is based on that standard. (R.Br. 70, 72, 97-98) This characterization of the petitioner's claim and emphasis by the respondent is inappropriate, insofar as the petitioner's claim is also based on well established Sixth Amendment principles made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

[1]Defense counsel subsequently made at least three other direct attempts to have the state judge reconsider her ruling, but to no avail. (A. 90, 91, 92)

The respondent contends that the petitioner did not raise a Sixth Amendment claim in the federal district court and should not be permitted to rely upon the Sixth Amendment for the first time in this Court. (R.Br. 101) The record before this Court clearly reflects that respondent's argument is totally without merit. The petitioner has consistently placed heavy reliance upon Sixth Amendment principles from the time of his direct appeal in state court, through the litigation in the lower federal courts, to his present posture before this Court on certiorari.

On direct appeal in state court, the petitioner argued that the trial court had violated his "right to due process of law and the doctrine set out in Washington v. Texas." (A. 182-183) (emphasis added) Washington v. Texas, 388 U.S. 14 (1967), holds that the Sixth Amendment right to compulsory process for obtaining witnesses applies to the states through the Due Process Clause of the Fourteenth Amendment.

Again, in the federal district court, the petitioner's application for a writ of habeas corpus expressly relied on Washington. The petitioner also relied heavily upon the more recent decision of this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). Chambers, of course, was based at least in part on the principles enunciated in Washington. See Chambers, supra at 302. (A. 202) Although Chambers was decided on fundamental fairness grounds, the Court recognized and discussed in depth the applicability of the Sixth Amendment rights to confrontation and cross-examination.

In his application for habeas corpus relief, the petitioner claimed that the action of the state trial

court had deprived him of his "due process right to present a defense, his right to confront and cross-examine witnesses, and his right to call witnesses on his own behalf." (A. 202) This claim was based on the following language from Chambers:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations: The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Chambers, supra at 294. (A. 200)

After denial of habeas corpus relief by the federal district court, the petitioner appealed to the United States Court of Appeals for the Fifth Circuit and argued:

> The district court erred in denying habeas corpus relief where the state trial judge applied a state evidentiary rule regarding the impeachment of one's own witness to preclude the petitioner from presenting evidence which would have tended to establish his defense, controvert the alibi testimony of the only other suspect's credibility, thus rendering the petitioner's defense far less persuasive and denying the petitioner due process of law. (Brief of Appellant at 10)

In addition to relying upon Chambers v. Mississippi and Washington v. Texas, the petitioner relied upon the newly decided case of Davis v. Alaska, 415 U.S. 308 (1974). Davis, of course, extended the Sixth Amendment right to confront and cross-examine to a state criminal defendant through the Fourteenth Amendment Due Process Clause.

Upon affirmance by the court below, the petitioner applied for certiorari review in this Court and presented the following question for review:

> Whether the instant decision of the United States Court of Appeals for the Fifth Circuit, which affirms a denial of federal habeas corpus relief where the state trial judge applied a state evidentiary rule regarding the impeachment of one's own witness to preclude the petitioner from presenting evidence which would have tended to establish his defense, controvert the alibi testimony of the only other suspect, and impeach the other suspect's credibility, thus rendering the petitioner's defense far less persuasive and denying the petitioner due process of law, is erroneous and is in real conflict with the decision by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973) and the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Torres, 477 F.2d 922 (1973). [2]

The petition expressly set forth the factual basis for the petitioner's claim, and requested this Court to review the judgment and opinion of the Fifth Circuit because the decision of the lower court misinterpreted and misapplied the facts and law of Chambers v. Mississippi. (Petition at 12) Thus, the petitioner's claim, since its inception on direct appeal, has been based on two very closely related aspects of Fourteenth Amendment due process: 1) fundamental fairness, and 2) the Sixth Amendment right to compulsory process and confrontation.

B. Contrary To Respondent's Contention, Petitioner Does Not Attack The Constitutionality Of Florida Statutes § 90.09 On Its Face, But Rather As Applied.

Contrary to respondent's contention, the petitioner does not challenge the constitutional validity of Florida Statutes § 90.09 implicitly or otherwise. (R.Br. 77) This case reflects a gross misapplication of that statute, as well as a denial of due process. However, section 90.09, on its face, can be and should be interpreted so as to be consistent with the requirements of Chambers v. Mississippi, supra.

---

[2] Supreme Court Rule 23(c) expressly provides that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

Defense counsel, on direct examination, inquired whether Linda had killed or struck her child. She testified that she had not. (A. 85) When defense counsel attempted to inquire whether Linda knew that Gary had not committed the crime, (A. 85-86) and again when defense counsel attempted to admit Linda's letters into evidence in an attempt to contradict her, (A. 88-92) the trial court thwarted his attempts on the basis that the evidence sought to be adduced was not inconsistent with Linda's testimony. (A. 88, 89, 90, 91, 92) These rulings constitute a misapplication of the provisions of § 90.09.

Section 90.09 provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.

Thus, the statute provides for two separate methods of contradicting a witness. If the witness is adverse, the witness can be contradicted by "other evidence" or proof of a prior inconsistent statement. Only when a party seeks to contradict his witness by proof of an inconsistent statement does the statutorily prescribed predicate come into play.

The principal problem encountered by defense counsel was that his every effort to inquire into the guilt of Linda and the innocence of Gary was thwarted by the trial court's acceptance of the state's objections based on the

voucher rule.[3] (A. 85-86, 88-92, 96-97) In each instance the trial court sustained the objection because, in the opinion of the trial court, the evidence sought to be admitted was not inconsistent with the limited testimony which the court had permitted the defense to elicit from Linda. (A. 88, 89,90, 91, 92)

Moreover, the fact that the trial court repeatedly sustained the prosecution's objections, under the circumstances of this case, indicates that the trial court took a narrow and unrealistic view of the requirement that the witness be "adverse". See Chambers, supra at 297-298. The facts and circumstances of the offense, and Linda and Gary's positions (A. 25, 89, 91) would, on the basis of common sense, lead an objective person to conclude that Linda must be considered adverse. But neither these factors nor the additional fact that Linda had filed for divorce against Gary (A. 92-93) was sufficient to impress the state trial judge.[4]

[3]Respondent indicates that "Florida law provides that a party may circumvent an adverse affect (sic) from the statutory voucher rule if that party proffers to the trial court that it cannot vouch for a witness's credibility," citing Tillman v. State, 44 So.2d 644 (Fla. 1950). (R.Br. 81) This contention proves too much. Upon calling Linda to the stand, defense counsel sought leave of court "to question the witness as an adversary and hostile witness." (A. 85) The fact that the trial court refused to call Linda as a court's witness upon defense counsel's initial and subsequent requests, pursuant to Tillman, adds to the trial court's responsibility for the damage done to the petitioner's ability to present a defense by the court's application of the voucher rule. Even after Linda had testified in a manner consistent with her innocence and the petitioner's guilt, the state trial judge repeatedly denied defense counsel's requests that Linda be declared an adverse or hostile witness. (A. 90, 91, 92) She responded to defense counsel's request that Linda be declared an adverse or hostile witness as follows: "That's right, and, boy, this is not an adverse witness." (A. 91) When defense counsel again raised the question, the judge said she had already ruled on that and quit arguing about it. (A. 92)

[4]The prosecutor urged an equally narrow and unrealistic definition of "adverse" or "hostile" witness upon the state court: "A hostile witness is one that won't answer the lawyer's questions when he asks questions on direct examination." (A. 92) This definition unrealistically excepts a witness who will answer a lawyer's questions, but will do so dishonestly and maliciously.

C. The Only Basis For The Trial Court's Exclusion Of The Evidence In Question Was Florida's Voucher Rule, Contrary To Respondent's Contention That Numerous Other State Evidentiary Rules Were Involved.

The respondent repeatedly relies on the argument that the petitioner's trial did not violate constitutional principles because "petitioner was precluded from utilizing various items of evidence because of numerous state evidentiary rules of law which warranted the exclusion of said evidence." (R.Br. 70) The respondent contends that "the record of petitioner's state court trial reveals that petitioner's excluded evidence was properly kept out because it failed to satisfy numerous principles of Florida evidentiary law." (R.Br. 71) (See also R.Br. 80, 82, 83, 91, 102) This contention is utterly false. The record reflects that the evidence in question was excluded because of the prosecution's invocation of Florida's voucher rule. The state trial court repeatedly and exclusively relied upon the voucher rule in sustaining the prosecution's objections. (A. 85-86, 88-92, 123-124)

Petitioner's position that the evidence in question was excluded solely on the basis of the voucher rule is supported by the finding of the court below that the evidence "was excluded by the state trial court on the authority of the Florida voucher rule." 512 F.2d 89. (A. 227)

Respondent notes that petitioner "called Linda Maness as his first defense witness. Immediately petitioner's attorney sought to impeach Linda before she had given any testimony either for or against petitioner. These questions (sic) were sustained on the ground that they were leading." (R.Br. 78)

The petitioner was entitled to exercise his right to cross-examine, as well as to adduce "other evidence" under

Florida Statutes § 90.09, without regard to whether Linda had given any testimony against the petitioner. Linda was clearly an adverse witness before she took the stand. Linda was the only other suspect. The state has listed Linda on its witness list, (A. 21-22) and the prosecution had subpoenaed her and brought her to the petitioner's trial from Texas. (A. 17) Additionally, defense counsel had twice indicated to the court that the petitioner's defense would be that Linda rather than Gary had committed the crime. (A. 25, 89)

It would be accurate to state that the prosecution objected to a number of defense counsel's questions to Linda as leading, and that those objections were sustained by the trial court. (A. 85-86, 89) However, it should be noted that had the trial court ruled that Linda was an adverse witness as repeatedly requested by the defense, counsel would properly have been permitted to lead the witness. Thus, the trial court's sustaining of these prosecution objections was but another form of the application of Florida's voucher rule to the detriment of the petitioner.

D. The Trial Court's Exclusion Of Linda's Letters Is Properly Subject to Redress By This Court.

Respondent argues that because the contents of all of Linda's letters were not made part of the record in the trial court, petitioner may not present the court's refusal to admit the letters into evidence[5] as reversible error because the record upon which such a reversal would be based is "incomplete." (R.Br. 50-51) This argument lacks merit. The record is replete with the efforts of defense counsel to admit these letters, the admission of which counsel characterized as "of utmost importance." (A. 89-90)

Defense counsel advised the court that he had a

[5]The court's basis for excluding these letters was Florida's voucher rule. (A. 88-89)

number of letters written by Linda to petitioner which he sought to introduce. (A. 88) The court immediately sustained the state's objection, which objection was based on the voucher rule. Defense counsel asked for argument on the question of the admission of the letters, and the trial judge specifically asked to see only the one letter which counsel had had an opportunity to present to the witness, Linda, to-wit: the letter dated April 28, 1971. As the letter was handed to the court, the prosecutor pointed out to the court that the letter or letters had not been marked for identification. (A. 88) The court, ignoring proper procedure, remarked "I know it." (A. 88)

> Q. (By defense counsel) Calling your attention to a letter dated April 28, 1971, I ask you, is this your signature and did you write that letter?
>
> A. (By Linda Maness) Yes.
>
> Q. To whom is that letter addressed?
>
> A. Gary.
>
> Q. Would you please read it to the Court.
>
> Mr. McWilliams: (Prosecutor) Objection, your Honor; improper predicate.
>
> The Court: Yes. Sustained.
>
> Mr. Minkus: Well, your Honor, can I have argument?
>
> The Court: Let's see it.
>
> Mr. Minkus: I have a whole bunch of letters, your Honor
>
> The Court: I just want to see the one we are talking about.
>
> Mr. Tunkey: (Prosecutor) It hasn't been marked for identification.
>
> The Court: I know it.
>
> Mr. McWiliams: This is not cross-examination, Judge.
>
> The Court: Sustained. (A. 88)

Thereafter, the court refused to allow any of the letters into evidence, based on Florida's voucher rule. (A. 90-91) Upon being advised by the court that the letters would not be admitted, defense counsel continued to argue for the introduction of the letters into evidence and as a result defense counsel asked:

> Mr. Minkus: Well, your Honor, I am just asking you; How do I go about entering these letters into evidence?
>
> The Court: You don't, not unless there's something that she says that's contrary. (A. 89)

Upon being advised that the letters would not be introduced, defense counsel, stating that the introduction of the letters was essential to the defense, asked for a recess so that he could research the law in order to find authority for the admission of the letters:

> Mr. Minkus: Your Honor, let me say this. It is of the utmost importance I get these letters admitted into evidence and the jury hears them. I would like to get an adjournment so I can find out how to do that.
>
> Mr. McWilliams: Judge, we have no time for law school. We are proceeding in the middle of a trial. (A. 90)

Upon being denied the recess, defense counsel once again asked for permission to treat Linda as an adverse witness:

> Mr. Minkus: Could I call her as an adverse witness?
>
> The Court: Do you want to let him?
>
> Mr. McWilliams: No, I object to it. She is not adverse. She will testify to the truth. (A. 90)

Thus, the court refused to admit these letters knowing that they were not marked for identification, refused to allow the defense to treat Linda as an adverse and hostile witness, and refused to grant defense counsel the recess he requested in order to research how the letters might properly be admitted into evidence. In light of the defense's herculean efforts to admit these letters, the respondent should not now be permitted to sustain the result reached by the court below on the basis that the letters were not marked for identification by the court. The fault, if any, in not having the letters properly marked, rests with the trial court, and not with the defense. Certainly, the failure to

have had these letters marked cannot legitimately be said to have been a waiver, voluntary or otherwise, by the defense of any of its rights with regard to the admission of these letters.

Furthermore, as is set forth in petitioner's main brief, sworn allegations as to the content of Linda's letters were made in the habeas corpus petition. (P.Br. 28-29) These statements were not controverted by the respondent in the district court. Moreover, the district court made specific findings as to the contents of these letters.[6] (A. 213-214) Because the habeas judge made findings as to the nature and contents of the letters, which findings were supported by the record, it is not proper for respondent to attempt to justify the denial of relief to petitioner predicated upon the perceived unavailability of the letters. See Walker v. Johnston, 312 U.S. 275, 284 (1941).

Respondent's argument that he could not deny the allegations appearing in the habeas corpus petition because the letters were not available is specious. (R.Br. 92) Rule 8(b) of the Federal Rules of Civl Procedure specifically provides:

> If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.[7]

---

[6]The district court's order of dismissal states:

> Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by petitioner to impeach or discredit his own witness. (A. 213-214) (emphasis added)

Neither these findings nor any other portion of the order of dismissal was the subject of a cross-appeal by the respondent in the court below.

[7]Rule 81(2) of the Federal Rules of Civil Procedure provides that those rules are applicable to habeas corpus practice.

The effect of the respondent's failure to deny the petitioner's averments is to admit same. This result is expressly provided for by Rule 8(d) of the Federal Rules of Civil Procedure. Thus, respondent's argument that he could not deny the averments in the habeas corpus petition because he had not read the letters is devoid of merit and should not be a basis in this Court or in the lower court upon which to deny this petitioner relief.

E. Respondent's Policy Argument Is Predicated Upon A Gross Mischaracterization Of Petitioner's Position.

Respondent attempts to argue that there are strong policy reasons why the petitioner's claim should not be redressed by this Court. (R.Br. 98-101) Respondent, rather incredibly, has mischaracterized your petitioner's position as follows:

> The very essence of Petitioner Maness' argument is that a defendant must be given free rein to present any evidence which in some way would support his defense in total derrogation (sic) of evidentiary rules of law. He seeks to threaten the trial court with the Constitution, thereby turning a shield into a sword. Petitioner thereby seeks to place the various governments of this country in the following position: The government cannot admit evidence obtained in violation of a defendant's constitutional rights no matter how truthful and telling that evidence is. Furthermore, the government must tow (sic) the line regarding evidentiary law, and if it faulters (sic), the defendant may press for reversal. But, when a defendant seeks to present evidence, nothing can stop him. He can act free of contraint while the government must passively stand by. The specter of such a situation is chilling. (R.Br. 98-99)

This gross mischaracterization manifests the respondent's fundamental lack of understanding of the issue before this Court. Petitioner is not attempting to carve out a special rule which would be applicable only to defendants in criminal trials. Rather, petitioner is attempting to end the arbitrary application of an archaic rule of evidence, the voucher rule,

which arbitrarily and capriciously prevents the prosecution as well as the defense from introducing into evidence relevant and material matters which have substantial value with regard to the truth finding process. The cases cited in petitioner's main brief establish that many state courts have applied Chambers to admit evidence by the prosecution notwithstanding the voucher rule. (P.Br. 30, 32, 33, 37)

F. The Respondent's Argument Regarding Exhaustion Of State Remedies Should Be Disregarded Or Rejected Because It Is Not Properly Before This Court, Was Not Presented To The Court Below, And, If Accepted By This Court, Would Alter Rather Than Affirm The Judgment Of The Court Below.

Respondent devotes one of his two arguments to his contention that the federal district court properly denied habeas corpus relief because the petitioner failed to adequately exhaust state remedies. (R.Br. 34-70) That argument should be stricken[8] or disregarded by the Court because it is not properly before this Court. Even if the Court considers the argument, the argument should be rejected.

1. The exhaustion issue is not properly before this Court because it was not part of the question presented for review, and was raised for the first time in this Court in the respondent's brief on the merits in violation of the express provisions of the rules of this Court.

The exhaustion issue was not raised in the petition for certiorari in this Court or in the respondent's brief in opposition. No cross petition was filed by the respondent.

The petition for certiorari in the instant case presented only one issue. That issue related to the treatment by the court below of the merits of a habeas corpus petitioner's claim that as a result of the application of Florida's voucher rule, his constitutional rights have been violated.

[8]At the time of this writing, petitioner has a motion to strike this argument pending before this Court.

The respondent, in his brief in opposition to the petition for writ of certiorari, expressly adopted the question presented by the petitioner. (R.Br. in Opp. 1) No other question was raised by the respondent. In his argument, respondent made no mention whatsoever of the exhaustion question. His argument was related exclusively to the question presented by the petitioner. The exhaustion argument is not a subsidiary question which could be said to be fairly comprised within the question presented.

Supreme Court Rule 40, which relates to both petitioners' and respondents' briefs on the merits, expressly provides that a brief may not raise additional questions or change the substance of the questions already presented in a petition for certiorari. Supreme Court Rule 40(1)(d)(2) and 40(3). Thus, pursuant to Rule 40, the exhaustion argument presented by the respondent is not properly before this Court and should be disregarded or stricken. Rondeau v. Mosinee Paper Corp., 422 U.S. 49 n. 11 (1975); Cort v. Ash, 423 U.S. 812 , 96 S.Ct. 2080 n. 6 (1975); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 330 (1967); J. I. Case v. Borak, 377 U.S. 426, 428-429 (1964); Irvine v. California, 347 U.S. 128, 129 (1954).

The respondent requests that the exhaustion issue be considered as plain error in order to escape the normal effect of Rule 40(1)(d)(2). (Response to Petitioner's Motion to Strike, at para. 9) This position is contrary to law and to the position taken by the respondent in the federal district court. In his response to the district court's order to show cause the respondent admitted that the exhaustion doctrine "is based upon the principle of comity rather than jurisdictional limitation, McIntyre v. New York, 329 F.Supp. 9 (D.E.D., 1971); Bell v. Alabama, 367 F.2d 243,

248 (5th Cir., 1966) ...." (A. 208-209) The respondent contends in his brief to this Court that the doctrine is "quasi-jurisdictional". (R.Br. 69)

The exhaustion doctrine, however, does not give rise to an issue which may properly be characterized as "plain error" or "quasi-jurisdictional." "The rule of exhaustion is not one defining power but one which relates to the appropriate exercise of power." Fay v. Noia, 372 U.S. 391, 420 (1963), quoting with approval from Bowen v. Johnston, 306 U.S. 19, 27 (1939). More recently, this Court has described the exhaustion requirement as "merely an accomodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Wilwording v. Swenson, 404 U.S. 249, 250 (1971). See also Bell v. Alabama, 367 F.2d 243, 248 (5th Cir. 1966).

The application of the exhaustion doctrine has traditionally been careful, but flexible. Its requirements have, for a variety of reasons, been waived in whole or in part by various federal courts and custodians of state prisoners. See, e.g., Thomas v. Arizona, 356 U.S. 390 n. 1 (1958); West v. State of Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), aff'd in pertinent part 510 F.2d 363 (5th Cir. en banc 1975); Boyer v. City of Orlando, 402 F.2d 966, 968 (5th Cir. 1968).

Assuming arguendo that the exhaustion argument could constitute "plain error", it is submitted that there is nothing in the facts and circumstances of this case to encourage the Court to exercise its option to review the argument. To the contrary, justice will be best served by disposing of this case on the merits. The petitioner has already been paroled by the State of Florida. (R.Br. 2) The

expense of this protracted litigation, which is being borne by the State of Florida, mounts daily. If the respondent was concerned about the issue he should have properly presented it for the consideration of this Court, if not for the consideration of the court below.

2. The exhaustion issue is not properly before this Court because it was not presented to the court below and formed no part of the judgment of that court.

The respondent did not attempt to argue the question of exhaustion either in his brief or during oral argument before the three judge panel of the court below. Subsequent to the rendition of the panel's decision, which affirmed the dismissal on the merits, the Fifth Circuit granted petitioner's suggestion for the appropriateness of rehearing en banc, and provided for supplemental briefs.

In his supplemental brief to the court en banc respondent raised the exhaustion issue for the first time before the Fifth Circuit. Petitioner moved to strike that portion of respondent's supplemental brief dealing with exhaustion.

This motion to strike was based on two basic principles: First, in that the respondent had not cross-appealed, he could not attempt either to enlarge his rights under the judgment or lessen the rights of the petitioner, citing Abel v. Brayton Flying Service, 284 F.2d 713, 717 (5th Cir. 1957), and also referring to Swarb v. Lennox, 405 U.S. 191, 201 (1972). Second, in that the respondent had not presented the exhaustion issue to the panel and the decision of the panel in no way addressed itself to that issue, it was improper for the respondent to raise the argument for the first time on rehearing en banc.

The Fifth Circuit entered an order stating that the motion to strike would be "taken with the case."

Thereafter, the Fifth Circuit vacated its order granting rehearing en banc. The opinion vacating the order granting rehearing en banc dealt with the merits of petitioner's claim, and reinstated the panel's decision on the merits. Thus, respondent's argument concerning the exhaustion of state remedies was not presented to or considered by the court below.

It is submitted that this case presents no reason for deviation from the normal policy of this Court that issues which have not been presented to the court of appeals and are not properly presented for review here will be disregarded. See Cort v. Ash, supra at n. 6; Neely v. Martin K. Eby Constr. Co., supra at 330.

> 3. The respondent's exhaustion argument, if accepted by this Court, would vitiate rather than affirm the judgment of the court below, which judgment is on the merits.

Respondent cannot be heard to argue that the exhaustion question is simply another means to support the judgment of the court below. The decision of the court below was based entirely on the merits of the case. Respondent's exhaustion contentions, if accepted by this Court, would lead to an entirely different result than that reached by the court below. This result was clearly not contemplated by the court below and, in effect, would vitiate its decision. The respondent should not be permitted to use this proceeding to collateraly attack the decision of the court below, in the guise of supporting that decision.

The petitioner's position in this regard is directly supported by Rondeau v. Mosinee Paper Corp., supra. In Rondeau, the respondent attempted to raise a point which had not been raised in the petition or respondent's opposition thereto, nor had it been made the subject of a cross-petition. This Court refused to consider the point:

> Because it would alter the judgment of the Court of Appeals, which like that of the District Court had effectively put an end to the litigation, rather than providing an alternative ground for affirming it, we will not consider the argument when raised in this manner. (citations omitted) Id. at n. 11.

Respondent has sought to justify his exhaustion argument on the principle that the prevailing party has broad latitude in presenting arguments which support the judgment on review. However, as in Rondeau, this principle cannot justify the respondent's position.

The respondent is not merely presenting an argument which involves "an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it." (R.Br. 66) The exhaustion argument advanced by the respondent, if accepted by this Court, would clearly not constitute an affirmance of the judgment of the court below, which decided the petitioner's case on the merits and effectively put an end to the litigation.

> 4. Even assuming arguendo that the exhaustion issue is properly before this Court, the Court should find that the exhaustion doctrine has been satisfied.

The respondent accurately states that in order "[t]o satisfy the exhaustion requirement, the substance of the state prisoner's federal claim must be fairly presented to the state court." (R.Br. 43) The respondent's statement of the requirement comports well with a recent statement of the requirement by the United States Court of Appeals for the Fifth Circuit:

> A habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement of § 2254(b). It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings. Lamberti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

If this Court were to review this issue, it is submitted that the Court would find that this standard has been met.

The respondent properly presented this issue to one court, the federal district court. That court found that the petitioner had adequately exhausted his state remedies. (A. 215)

In the district court the respondent took the following position:

> Respondent does not here suggest the filing of a "repetitious application" Brown v Allen, 344 U.S. 443, or the "mere possibility of success in additional proceedings" Roberts v. LaVallee, 389 U.S. 40 (1967), but that if Chambers v Mississippi, is controlling of the instant course, it represents the first clear mandate that existing accepted state practice is deficient, and warrants that the state courts have the initial opportunity of compliance with the High Court's ruling. (A.209)

The district court, in its order of dismissal rejected the respondent's exhaustion argument. The district court quoted this Court's language from Chambers stating that "In reaching this judgment we establish no new principles of constitutional law." and went on to hold:

> It is the opinion of this Court that in his direct appeal the petitioner presented the Florida Appellate Court with a fair opportunity to apply the constitutional principles discussed in Chambers to the facts and circumstances of petitioner's case. See Chambers, supra at 305, footnote 3. (A. 215)

The due process claim presented to the federal district court was substantially the same as that presented to the state appellate court. That claim was that the state trial court's application of Florida's voucher rule had violated petitioner's right to a fair trial and the Sixth Amendment

guarantees included within the Due Process Clause.[9] (A. 182-183)

This argument was based on the following assignments of error filed on behalf of the petitioner:

> 8. The trial court erred in denying a defense motion to question Linda Maness as a hostile witness.
>
> 9. The trial court erred in excluding the testimony of Dana Maness and Ruth Maness relating to conversations with Linda Maness. (A. 173)

Respondent observes that "[p]etitioner did not assgin assign error to these rulings on constitutional grounds." This comment is inappropriate and misleading.

The Supreme Court of Florida has stated the following with regard to the function of an assignment of error:

> An assignment of error is the ground or point relied on for reversal on appeal. The assignment of error performs the same function in the appellate court as the complaint or declaration in the court of original jurisdiction. Redditt v. State, 84 So.2d 317 (Fla. 1955).

Florida Appellate Rule 3.5(c) expressly provides that assignments of error must refer to "identified judicial acts which should be stated as they occurred; grounds for error need not be stated in the assignment."

After oral argument, the state appellate court entered its judgment and opinion affirming the petitioner's conviction. (A. 186-187) The court approved the trial court's application of the voucher rule to sanctify the testimony of Linda Maness: "An attempt by the defendant to impeach his

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[9]The point on appeal in question (Point II), was supported by two other points of relevance here. In Point I, the petitioner argued that the evidence was insufficient because it did not exclude the reasonable hypothesis that the petitioner's wife was the responsible party. (A. 180-181) In Point III as well as Point I, the petitioner argued that the petitioner's confession had been involuntary and had been given by the petitioner in an effort to save his wife from jail. (A. 184-185)

own witness was properly denied by the court, on objection by the state." Maness v. State, 262 So.2d 716, 717 (Fla. 3rd D.C.A. 1972). (A. 187)

Respondent accurately observes that the court based its decision on state evidentiary law, rather than federal constitutional law. (R.Br. 37) However, the failure of the state court to address itself to or even mention the federal constitutional issue does not mean that the petitioner did not present such an issue or that the court was not afforded a fair opportunity to rule upon it.[10] To the contrary, the federal district court, the only court in which the issue was properly raised by the respondent, concluded that the petitioner had adequately satisfied the exhaustion doctrine. (A. 215) This conclusion is supported by this Court's decision in Wilwording v. Swenson, supra at 250 (1971):

> Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. Fay v. Noia, 372 U.S. 391, 438 83 S.Ct. 822 9 L.Ed.2d 837 (1963). Petitioners are not required to file "repetitious applications" in the state courts. Brown v. Allen, 344 U.S. 443, 449 n. 3, 73 S.Ct. 397, 403, 97 L.Ed. 469 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief. Roberts v. LaVallee, 389 U.S. 40, 42-43, 88 S.Ct. 194, 196-197, 19 L.Ed/ 2d 41 (1967); Coleman v. Maxwell, 351 F.2d 285, 286 (CA6 1965).

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[10] There can be no legitimate argument that petitioner did not raise his constitutional claim as a basis for reversal in the District Court of Appeal of Florida, Third District. See argument A, infra at 1-4

See also McCluster v. Wainwright, 453 F.2d 162 (5th Cir. 1972).

Thus, because the Florida district court of appeal had a fair opportunity to pass upon petitioner's federal claim, it is unnecessary for petitioner to have made any additional applications to other Florida state courts.

CONCLUSION

For the reasons stated hereinabove and in the main brief for petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was delivered by United States mail to the office of the Honorable Arthur Joel Berger, Assistant Attorney General, 8585 Sunset Drive, Suite 75, Miami, Florida, 33143, and to the Honorable William L. Rogers, Special Assistant Attorney General, c/o Snyder, Young, Stern, Barrett & Tannenbaum, 17071 West Dixie Highway, North Miami Beach, Florida, 33160, this 16th day of March, 1977. We further certify that all parties required to be served have been served.

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